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IN THE

# Supreme Court of the United States

October Term 1978

No. 78-

COLUMBIA PICTURES INDUSTRIES, INC., ET AL.,

*Petitioners,*

v.

UNITED STATES OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 4, 1979

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTES AND RULE INVOLVED | 2 |
| QUESTIONS PRESENTED | 2 |
| STATEMENT OF THE CASE | 3 |
| 1. The Complaint | 3 |
| 2. The Proposed Consent Decree | 4 |
| (a) Options | 4 |
| (b) Exclusivity | 4 |
| (c) Internal Network Production And Talent Exclusivity | 5 |
| 3. The Lockstep Provisions Of The Decree Sanction Continued Collective Action By The Networks | 6 |
| 4. Opposition To The Decree And The CPI Motion To Intervene | 7 |
| 5. Entry Of The Final Judgment And Denial Of The CPI Motion To Intervene | 8 |
| 6. The Court of Appeals' Affirmance Of The Denial Of Intervention | 8 |
| REASONS FOR GRANTING THE WRIT | 9 |
| 1. This Case Presents Important Unresolved Questions Of Interpretation Of The APPA Requiring The Supervisory Guidance Of This Court | 9 |
| 2. The Ninth Circuit's Decision Conflicts With The Holdings Of This Court Respecting The Rights Of Third Parties To Intervene In Cases Such As This | 10 |
| 3. The Consent Decree Has A Major Anticompetitive Effect On The Television Industry As A Whole And Review Is Appropriate In Light Of That Effect | 13 |
| CONCLUSION | 14 |
| APPENDICES | |
| A. Statutes and Rule | 1a |
| B. Complaint, *United States v. National Broadcasting Company, Inc.*, Civil 74-3601 RJK (C.D.Cal.) | 8a |
| C. Final Judgment, *United States v. National Broadcasting Company, Inc.*, entered November 28, 1977 | 18a |
| D. Civil Minutes—General (Denying Motion of Columbia Pictures Industries, Inc. to Intervene) | 37a |
| E. Memorandum of Decision Re Consent Decree | 38a |
| F. Memorandum, *United States v. National Broadcasting Company, Inc.*, filed June 4, 1979 | 76a |

## TABLE OF AUTHORITIES


CASES — PAGE

*Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) ..... 10, 11, 12

*FCC v. Midwest Video Corp.*, 47 U.S.L.W. 4335 (1979) ..... 13

*FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ..... 13

*United States v. Associated Milk Producers, Inc.*, 394 F.Supp. 29 (W.D.Mo. 1975) ..... 2

*United States v. First National Bank and Trust Co. of Lexington, Ky.*, 280 F.Supp. 260 (D.C. Ky. 1967) ..... 11

*United States v. Gillette Co.*, 406 F.Supp. 713 (D.Mass. 1975) ..... 10

STATUTES

Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ..... 2, 3, 7, 8, 9, 10

Sherman Antitrust Act, 15 U.S.C. § 1 and 2 ..... 2, 3

28 U.S.C. § 1254(1) ..... 2

28 U.S.C. § 2101(c) ..... 2

RULES

Federal Rules of Civil Procedure

Rule 24 ..... 9, 10

Rule 24(a) ..... 3, 7

Rule 24(b) ..... 3, 7

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Columbia Pictures Industries, Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, Universal City Studios and Warner Bros. Inc. ("CPI") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in *United States v. National Broadcasting Company, Inc.* on June 4, 1979.

## OPINIONS BELOW

The opinion of the Court of Appeals, not presently reported, appears in the Appendix hereto at App. 76a[1]. The order of the District Court for the Central District of California, also not reported, appears in the Appendix hereto at App. 37a.

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[1] References to "App. ...." are to the separate Appendix to this petition submitted herewith.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit denying the CPI appeal was entered on June 4, 1979. This petition for certiorari was timely filed in accordance with 28 U.S.C. § 2101(c) and U.S. Sup. Ct. R. 22 and 34. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND RULE INVOLVED

This case involves the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, set out in the Appendix hereto at App. 1a, the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1977 Supp.), set out in the Appendix hereto at App. 2a, and Rule 24, F.R.Civ.P., set out in the Appendix hereto at App. 6a.

## QUESTIONS PRESENTED

The District Court approved a sweeping consent decree, legitimating comprehensive and anticompetitive practices in the purchasing of television programs by one of the three national television networks as "in the public interest," without a hearing and without the opportunity for the affected program suppliers to intervene or otherwise participate before the court. Notwithstanding the recently enacted Antitrust Procedures and Penalties Act ("APPA") establishing a set of alternative methods for court administration of the consent decree process,[2] the District Court did not hear testimony from Government offi-

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[2] The APPA, 15 U.S.C. § 16(b)-(h) (1977 Supp.), adopted in 1974, provides for public comments on proposed consent decrees, publication of such comments and government responses thereto. The statute also requires the court to make an independent public interest determination, 15 U.S.C. § 16(e), and sets forth specific alternative procedures for participation by interested parties or agencies. *See, United States v. Associated Milk Producers, Inc.*, 394 F.Supp. 29 (W.D.Mo. 1975), *aff'd*, 534 F.2d 113 (C.A.8 1976), *cert. denied*, 429 U.S. 940 (1977).

cials or experts, did not appoint a master or request evaluations of the effects of the decree, did not permit intervention or other specific limited participation before the court by interested persons or agencies, and did not undertake any effort to determine — independent of the Government and the defendant — whether the proposed decree met the public interest standard. Under these circumstances,

1. Did the District Court err in denying the CPI motion to intervene as of right under F.R.Civ.P. 24(a) when it did not follow any of the other procedures set forth in 15 U.S.C. § 16(f) for assuring an independent determination of the effect of the consent decree on the public interest? and

2. Did the District Court, while evading the same procedures in the APPA, abuse its discretion in denying the CPI motion to intervene permissively under F.R.Civ.P. 24(b)?

## STATEMENT OF THE CASE

### 1. The Complaint.

This case involves the resolution of one of three complaints by the United States against the major television networks—the National Broadcasting Company, Inc. ("NBC"), CBS Inc. ("CBS"), and American Broadcasting Companies, Inc. ("ABC")—filed simultaneously in the United States District Court for the Central District of California on December 10, 1974. The Complaint in the case against NBC parallels the complaints in the pending cases against CBS and ABC. It alleges that NBC has monopolized and unreasonably restrained the television program supply market, particularly the "prime-time" market, in violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2. As the Government developed its theory, it became clear that it was asserting that in an entry-proof, three-buyer market, the buyers had successfully eliminated the need to compete among themselves on economic

terms for the products being offered to them by independent program suppliers. The Complaint against NBC sought an injunction precluding NBC from broadcasting entertainment programming produced by NBC and from using its monopoly power to restrain competition in the programming market by obtaining certain exclusivity and option rights.

**2. The Proposed Consent Decree.**

On November 17, 1976, the Government and NBC filed a stipulation providing for the entry of a consent decree. Unfortunately, that decree recognizes and legitimates the very anticompetitive practices which the Government had sought to curb by its action against NBC and which it continues to assail in its suits against ABC and CBS. The extraordinary effect of the decree on the structure of the American communications industry is exemplified by several key provisions relating to the terms on which NBC may obtain programs from independent producers.

**(a)** ***Options.***

A key target of the three actions is the networks' collective insistence on long-term options. The networks will not air a series if they only receive exhibition rights for its first season. Instead, they insist on options covering the useful life of most prime-time series, generally five years. Moreover, the prices paid for these exhibition rights are set before the program has ever been shown, and before its popularity, and hence value, can be ascertained. As might be expected, these pre-set prices tend to be similar among the three networks, and tend to be uniformly low.

**(b)** ***Exclusivity.***

Another Government target is the networks' requirement that sales of certain programming to the networks be exclusive, precluding program suppliers, for example, from licensing older

episodes of a series to other buyers. This practice results in restrictions on the availability of programming to independent stations; it affects program supplies to distributors using new technologies, such as cable or satellite; and it eliminates bidding contests among the networks and local stations for older episodes of successful prime-time series. This policy prevents price competition among networks and limits competition between network-affiliated stations and independents.

(c) ***Internal Network Production And Talent Exclusivity.***

At the heart of the Government antitrust complaints are concerns about the enormous economic power the three networks derive from their ownership of television stations in the key television markets and from their power as purchasing agents for more than 600 network-affiliated stations of the 700 or so VHF television stations in the country. That power is enhanced by the capacity of each network to combine the separate functions of producer and exhibitor. Internal network production of entertainment programs—even the threat of such production—has an unfair competitive impact on the market for scarce prime-time program slots. The leverage of internal production is compounded by the power of the networks to engage the talents of writers, directors and actors exclusively. Because of the lack of separation of production and exhibition, the networks can offer to talent something no one else can offer: guaranteed exposure of their work on network broadcasts. Network talent exclusivity restricts the pool of talent available to independent producers, thereby limiting their capacity to offer the most attractive programming—to networks and to non-network purchasers. As a result, competition with the networks is limited.

***As to all three of these key aspects of the Government complaint the consent decree placed a judicial imprimatur on existing anticompetitive industry practices.***

The consent decree approved by the District Court leaves the policy of long-term options in place, confirming the right of NBC to have extensive and anticompetitive option terms.[3] Rather than materially eliminating or altering the exclusivity provisions, the consent decree in fact legitimates and preserves some of their most egregious aspects.[4] Finally, as the District Court noted in its Memorandum of Decision Re Consent Decree, "it is an uncontested fact that . . . pursuant to the terms of the judgment NBC will be entitled to more hours of prime-time internally-produced television programming than NBC is in fact presently generating."[5] Also, the decree does nothing to restrict NBC from signing producers, writers, directors or performers to exclusive contracts.[6]

### 3. The Lockstep Provisions Of The Decree Sanction Continued Collective Action By The Networks.

The consent decree provides that certain provisions, such as those dealing with options and internal production, shall not go into effect unless and until similar relief is obtained against

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[3] The decree sanctions a four-year option term in contracts between NBC and the program supplier; it sanctions a right to negotiate for a fifth year of broadcast rights after the *first broadcast* in the first year; and it sanctions first negotiation and first refusal rights during the final year of the contract for further exhibition rights. Final Judgment, Section VI(E)(i). Thus, the consent decree endorses long-term options as a permissible program procurement practice by NBC, notwithstanding prior and continuing Government assertions—against ABC and CBS—that these are anticompetitive practices.

[4] Under the decree, NBC may still preclude a program supplier from licensing older episodes of a program shown on NBC to independent stations or others for non-prime time broadcast five days a week ("stripping") for four years after the first prime-time episode broadcast on NBC. Final Judgment, Section VI(E)(ii).

[5] Memorandum of Decision Re Consent Decree, Section IV(A)(1), App. at 62a; and Final Judgment, Section V. By expanding the practice to a possible two and a half hours of prime-time per week, the consent decree sanctions the use of NBC produced feature-length motion pictures, thus potentially restricting the market for films produced by the major studios or limiting the price NBC pays outside feature film suppliers.

[6] *See* Memorandum of Decision Re Consent Decree, Section IV(A)(5).

ABC and CBS.[7] It also provides that if the final relief against ABC or CBS is less stringent, then NBC may apply for relief to prevent it from being placed at a competitive disadvantage.[8] The decree thus sanctions collective action by the networks in their dealings with program suppliers, notwithstanding the Government's assault on such uniformity in the pending cases. By these provisions, the Government has converted a *per se* antitrust violation into protected activity.

The consequence of this aspect of the decree will be a set of standard contract provisions, with uniform restrictions among the networks, all sanctioned by court approval. The three networks will continue to offer suppliers of television programs virtually identical terms and conditions.

**4. Opposition To The Decree And The CPI Motion To Intervene.**

As provided by the APPA, interested parties filed comments with the Department of Justice opposing entry of the consent decree. CPI, among others, filed comments with the Department requesting that the Government withdraw the proposed decree because of the adverse impact the decree would have on relationships between program suppliers and television networks.

On June 17, 1977, CPI moved to intervene for the limited purpose of demonstrating that the proposed consent decree was not in the public interest, alleging that they were directly affected and that they were entitled to participate under the Federal Rules of Civil Procedure and the APPA.[9]

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[7] Final Judgment, Section VII.

[8] Final Judgment, Section IX.

[9] CPI argued that Rule 24(a), F.R.Civ.P., sanctioned intervention as of right, and that, in any event, they should be permitted to intervene under Rule 24(b), F.R.Civ.P. As program suppliers, CPI surely had an interest in "the property or transaction which is the subject of the action."

Furthermore, CPI contended that the existing parties to the action—the Government and NBC—obviously could not adequately represent their interests. Having negotiated the decree, both parties

Two months after the CPI motion to intervene was filed, the District Court took the motion "under submission until further proceedings on the proposed consent [sic] are held."

**5. Entry Of The Final Judgment And Denial Of The CPI Motion To Intervene.**

No "further proceedings" on the proposed consent decree were ever held. On November 23, 1977, the District Court signed and filed the sweeping consent decree, with minor changes, as the Final Judgment, without responding to any of the arguments which had been raised, without stating any reasons for approval and without ruling on the CPI motion to intervene. The Final Judgment is reported at 1978-1 Trade Cas. ¶ 61,855, and is set forth at App. 18a.

On November 30, 1977, a week after entry of the Final Judgment, the District Court denied the CPI motion to intervene. No reasons were given. A copy of the Civil Minute Order denying the Motion to Intervene is set forth at App. 37a. Two months later—and a month after CPI had filed a notice of appeal from the order denying the motion to intervene—the District Court filed a Memorandum of Decision Re Consent Decree. The Memorandum of Decision is reported at 449 F.Supp. 1127 and 1978-1 Trade Cas. ¶ 61,842 and is set forth at App. 38a.

**6. The Court Of Appeals' Affirmance Of The Denial Of Intervention.**

On December 12, 1977, CPI filed their appeal from the District Court's denial of their motion to intervene.

On June 4, 1979, the United States Court of Appeals for the Ninth Circuit affirmed the order of the District Court,

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had an understandable interest in defending it from the challenge that it was purely cosmetic. CPI pointed out that it was precisely because the Government would be reluctant to acknowledge an error in judgment that Congress had enacted the APPA to provide for participation by third parties before a decree became final. *See, e.g.*, 15 U.S.C. § 16(f)(1) and (3).

holding that, notwithstanding the absence of any hearing or other meaningful method of third party participation before the trial judge as contemplated by the APPA, the District Court had complied with the Act and was not required to permit intervention. The Memorandum of the Court of Appeals, not presently reported, is set forth at App. 76a.

## REASONS FOR GRANTING THE WRIT

### 1. This Case Presents Important Unresolved Questions Of Interpretation Of The APPA Requiring The Supervisory Guidance Of This Court.

Since the passage of the APPA, there has been no guidance by this Court concerning the rights of substantially affected parties to participate under the APPA in the shaping of industry-wide consent decrees in Government antitrust cases. There is a vital need for the exercise of this Court's supervisory responsibility in this important procedural matter. In this case, for example, there are important issues concerning the relationship of intervention under Rule 24 to other procedural rights under the APPA which seem to be specifically available and which were not utilized in this case.[10]

The goal of the APPA is remedial—it is to open up proposed consent decrees between the Government and alleged antitrust violators to public scrutiny and to put an end to judicial "rubber stamping" of privately negotiated settlements.

The APPA carefully provides for an array of specific techniques to ensure adequate participation before a federal district court before the court makes a determination that entry of the consent decree is in the public interest. How trial judges acquit themselves of their responsibility and how courts should use their discretion to select appropriate techniques pose ex-

[10] It is noteworthy that in its opinion in this case, the Court of Appeals' analysis of intervention under F.R.Civ.P. 24 does not even consider the impact of the APPA.

tremely difficult problems for federal district courts. *See, e.g. United States v. Gillette Co.*, 406 F.Supp. 713, 715 (D.Mass. 1975).

Failure to follow the procedural alternatives of the APPA has two consequences which are important for this Court to review:

(a) If the procedures suggested by the APPA as a means of "opening up" the consent decree process are not followed by the District Court, and intervention is not permitted, what vitality remains in the independent judicial determination of whether the decree is in the "public interest"? and

(b) If the District Court rejects all of the requests for intervention or other participation by interested third parties and enters a broad consent decree with substantial impact on a national market of enormous importance, will that decree be forever shielded from appellate review?

These are inevitable and important questions under the APPA which will present recurring problems to both trial and appellate courts. They should be answered in this case so that there is guidance for district courts in this new and unreviewed area of antitrust law.

**2. The Ninth Circuit's Decision Conflicts With The Holdings Of This Court Respecting The Rights Of Third Parties To Intervene In Cases Such As This.**

The Ninth Circuit misread and misconstrued this Court's historic view of the right of directly affected parties to intervene under Rule 24 in major antitrust proceedings. In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), this Court held that a directly affected party must have the right to intervene where the Government perpetuated—by consent decree—the very acts it had sought to eliminate in the action it had brought under the antitrust laws. When the

Government abandons its position in such situations, it falls to third parties to ensure that there is adequate representation of the public interest and the policy of the antitrust laws. This role of third parties not only safeguards their rights and protects the public interest in vigorous enforcement of the antitrust laws, but it also serves another important purpose:

> "Compromising cases of this magnitude, when they have reached the stage that this case has reached, creates a feeling of uneasiness in the public mind." *United States v. First National Bank and Trust Co. of Lexington, Ky.*, 280 F.Supp. 260, 263 (D.C. Ky. 1967), *aff'd per curiam sub nom. Central Bank and Trust Co. v. United States,* 391 U.S. 469 (1968).[11]

Although there was, in *Cascade,* some disagreement on the Court as to the degree of inadequacy of Government representation necessary to trigger this intervention right,[12] it is clear that the total failure of representation in this case satisfies any such standard. As we have shown, in each key area where the Government sought competition-enhancing change, the consent decree ratified continuing anticompetitive practices, imposing only cosmetic improvements. The consent decree involved herein allows NBC to continue its unlawful procurement practices within the broadest of boundaries. Moreover, even the superficial limitations which the decree does impose are contingent upon the success of the Government's actions against ABC and CBS. Finally, because actions are still pending against ABC and CBS, this decree does not even serve judicial economy.

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[11] The trial court allowed intervention, in part, to assure that a third party would have standing to obtain appellate review of a consent judgment in an important antitrust case.

[12] The majority referred to the Government as having "knuckled under" in settling the action. The two dissenters, on the other hand, felt that a "complete failure of representation" had to be shown. No choice of labels need be made in this case, however, since it is clear the Government totally failed to represent the interests of the public and CPI.

NBC and the Government may argue that the twin attacks by CPI and CBS demonstrate the compromise nature of the consent decree, since CPI argue the decree confirms anticompetitive practices and achieves nothing, while CBS argues that the decree exacts too much. One interpretation—and one CPI urge for this Court's consideration—is that opposition to the decree by one of the other two defendant networks is consistent with an intelligent strategy to defeat the CPI claim by providing an appearance of balance. By helping to insulate the consent decree from appellate review and reversal, CBS may effectively limit the potential relief the Government can achieve against it and ABC in the pending cases to the feeble remedy achieved against NBC.

*Cascade* is not a precedent for all seasons or all parties. In *Cascade,* this Court demonstrated the importance of intervention to prevent the Government from "knuckling under" to a private defendant—not protecting the public interest and therefore not adequately representing affected parties. Here, as in *Cascade* and *Central Bank,* the Government cannot hide behind the mantle of public representation because the Final Judgment is wholly inconsistent with the gravamen of the Complaint and the Government's theory of the case. Furthermore, although *Cascade* pre-dated the APPA, the APPA is consistent with, and indeed reinforces, the policy articulated in *Cascade.* Both seek to assure full exploration of the effects of a prosposed consent decree and, where required, intervention by private parties asserting the claim that the Government has bargained away substantially all it sought in the underlying action. Because the District Court in this case ignored the alternatives provided by the APPA to aid its determination of the "public interest," the *Cascade* test remains a valid precedent guaranteeing the rights of CPI to intervene.

The decision below is in direct conflict with this Court's decision in *Cascade.* For this reason a writ of certiorari should issue.

**3. The Consent Decree Has A Major Anticompetitive Effect On The Television Industry As A Whole And Review Is Appropriate In Light Of That Effect.**

This Court has frequently recognized the appropriateness of granting certiorari in cases which involve the very structure of the communications media, *see, e.g., FCC v. Midwest Video Corp.*, 47 U.S.L.W. 4335 (Apr. 2, 1979) (access to cable TV); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (restrictions on common ownership of communications media), perhaps because of the critical relationship between industry structure and First Amendment values.

The consent decree—if implemented—will most assuredly have a dramatic impact on the structure of the entire television industry by decreasing the likelihood of any competition which threatens the supremacy of the three networks. For example, the potential competitors of network broadcasters which cannot afford to broadcast only original material often broadcast older episodes of network programs. Under the exclusivity provisions authorized by the consent decree, however, NBC will continue to be able to withhold this necessary product from these existing competitors and from potential new entrants into the market.

Similarly, the long-term option provisions sanctioned by the consent decree also lock out non-network broadcasters from important ways of competing effectively with the networks. Success for a television series typically depends on an initial showing on network television. By combining long-term options and exclusivity, networks secure for themselves a successful series and spin-offs from it for the entire first-run life of the program. If long-term options were prohibited, on the other hand, non-network broadcasters would be able to compete effectively with the networks for the exhibition rights to new episodes of an established series as well as rebroadcast rights to old episodes. Furthermore, the higher profits which program suppliers would realize without long-term options would result in greater resources for network competition. Finally, restric-

tions on long-term options would greatly enhance the creative freedom of the producers, since in a dispute over program contents, they would have the meaningful alternative of taking their program elsewhere.

In sum, the District Court has approved a consent decree which has immense ramifications for the entire television industry. In the Memorandum of Decision Re Consent Decree, the trial judge made the following comment:

> "Apparently the government by the three pending lawsuits chose not to challenge therein the oligopolistic structure of the television industry, but rather, recognizing the immense market power of each network, sought merely to limit the exercise of that individual power. . .". Memorandum of Decision Re Consent Decree, Section IV (A)(4), App. at 56a.

Because the decree fails to limit the anticompetitive effects, and simultaneously confirms the anticompetitive structure, of so basic an element of the communications industry, review is imperative. Only if CPI is allowed to intervene can an appellate court review and reverse the District Court's approval of the pernicious consent decree.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Dated: August , 1979

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# Appendices

# APPENDIX A

## STATUTES AND RULE

### SHERMAN ACT, SECTION 1, 15 U.S.C. § 1

**Trusts, etc., in restraint of trade illegal; penalty.**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

### SHERMAN ACT, SECTION 2, 15 U.S.C. § 2

**Monopolizing trade a felony; penalty.**

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

## ANTITRUST PROCEDURES AND PENALTIES ACT, 15 U.S.C. § 16(b)-(h)

**(b) Consent judgments and competitive impact statements; publication in Federal Register; availability of copies to the public.**

Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any response by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) description and evaluation of alternatives to such proposal actually considered by the United States.

**(c) Publication of summaries in newspapers.**

The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

(i) a summary of the terms of the proposal for consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b) of this section,

(iii) and a list of the materials and documents under subsection (b) of this section which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

**(d) Consideration of public comments by Attorney General and publication of response.**

During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for

the consent judgment submitted under subsection (b) of this section. The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

**(e) Public interest determination.**

Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

**(f) Procedure for public interest determination.**

In making its determination under subsection (e) of this section, the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

**(g) Filing of written or oral communications with the district court.**

Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the

Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

**(h) Inadmissibility as evidence of proceedings before the district court and the competitive impact statement.**

Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 15a of this title nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

## FEDERAL RULES OF CIVIL PROCEDURE

### Rule 24.

### INTERVENTION

**(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

**(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

**(c) Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.

## APPENDIX B

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## UNITED STATES DISTRICT COURT
## CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>*Plaintiff,*<br>v.<br>NATIONAL BROADCASTING COMPANY, INC.,<br>*Defendant.* | Civil Action No. 74 3601<br>Filed:<br>(Equitable Relief Complaint for Violation of Sections 1 & 2 of the Sherman Act) |

## COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendant named herein and complains and alleges as follows:

## I

## JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. § 4), as amended, commonly known as the Sherman Act, in order to prevent and restrain the continuing violation by the defendant, as hereinafter alleged, of Sections 1 and 2 of said Act (15 U.S.C. §§ 1, 2).

2. The defendant, National Broadcasting Company, Inc., whose West Coast studios and offices are in Burbank, California, transacts business within the Central District of California.

## II

## DEFINITIONS

3. As used herein:

(a) "Affiliate" means a television station which has an affiliation agreement with National Broadcasting Company, Inc., pursuant to which it receives television programs and advertising messages for broadcast, and receives compensation for the use of its time and facilities.

(b) "Prime evening hours" are the hours from 6:00 p.m. to 11:00 p.m. in the Eastern time zone of the United States.

(c) "Television entertainment programs" means all programs shown on television other than news, public affairs, documentary or sports programs.

(d) "Outside program supplier" means a producer or supplier of television entertainment programs other than a television network.

## III

## DEFENDANT

4. National Broadcasting Company, Inc. (hereinafter NBC) is hereby named as defendant. NBC is a corporation organized and existing under the laws of the State of Delaware. It is a subsidiary of the RCA Corporation. NBC owns and operates commercial television stations in five of the nation's leading television markets (New York City, Los Angeles, Chicago, Washington and Cleveland). NBC is engaged, among other things, in the operation of the NBC Television Network, which furnishes television programs and related advertising messages to approximately 200 affiliates located throughout the United States and to the television stations which are owned and operated by NBC. NBC remits part of the revenues it receives from advertisers to its affiliates. NBC itself produces some of the programs broadcast on its television network. NBC also owns various financial interests in programs produced by others and broadcast on its television network.

5. Although NBC is primarily engaged in television and radio network broadcasting, its parent, RCA Corporation, is engaged in the following activities, among others:

(a) Production, distribution and sale of phonograph records and tapes;

(b) Publishing through Random House, Inc., a wholly-owned subsidiary.

## IV

## TRADE AND COMMERCE

### A. Interstate Commerce

6. Television programs and related advertising messages, filmed, taped and live, are conveyed by program suppliers and networks across State lines to television stations throughout the

United States, from which stations said programs are transmitted across State lines to viewers. A continuous stream of interstate commerce and the use of interstate means of communication results therefrom, including the collection and payment of fees, voluminous written and frequent verbal communications, and substantial amounts of advertising copy, recordings, transcriptions, films, contracts and checks.

7. Commercial television programs are created and produced by television networks, outside program suppliers, television stations, and by motion picture studios, which supply feature films and other programs for television broadcast. In 1973, the three nationwide commercial television networks (NBC, CBS, Inc. (CBS) and American Broadcasting Companies, Inc. (ABC)) spent more than $1,000,000,000 for television programs, of which NBC spent more than $340,000,000. In 1973, total television broadcasting revenues for the aforementioned three networks were in excess of $1,400,000,000, of which NBC received more than $470,000,000.

**B. Television Programming**

8. There are approximately 700 television stations in the United States which broadcast commercial television programs. Of these, about 200 stations have network affiliation agreements with NBC. During prime evening hours, when television viewing is at its peak, most of these stations depend upon NBC for virtually all of their television entertainment programming. A television entertainment program generally cannot reach the audiences of such stations during prime evening hours unless it is transmitted by NBC over the NBC Television Network.

9. The value of any television program to its producer, and to an advertiser whose message is broadcast in conjunction with it, depends in large part on the number of television viewers who see the program and observe the commercial messages. The largest television audiences in the United States are readily

available only to those producers whose programs are carried by the NBC, CBS or ABC television networks, and to those advertisers whose commercial messages are broadcast during said programs, and the right to broadcast such programs and commercial messages on any of these three television networks can be purchased only from them.

10. Many advertisers formerly were able to purchase air time from networks (including NBC) and to purchase television entertainment programs from outside program suppliers for broadcast during such air time. Such advertisers constituted a substantial market for outside program suppliers. Now, however, the networks (including NBC) generally will not offer to sell air time to advertisers except for their commercial messages which are broadcast in conjunction with television entertainment programs already selected and placed in schedules by the networks. As a result, the three nationwide commercial television networks (NBC, CBS and ABC) constitute the primary market for television entertainment programs.

11. Most of the prime time television entertainment programs broadcast on the NBC Television Network have been programs which have either been produced by NBC itself or with respect to which NBC owns a right or interest in addition to a license to broadcast. In 1957, such programs constituted about 43 percent of the television entertainment programs broadcast on the NBC Television Network during prime time evening hours. By 1967, this figure had increased to 68 percent, or 74 percent if feature films are excluded.

12. The commercial value of a television entertainment program is not exhausted by its first network showing. Frequently thereafter a program is distributed to individual television stations in the United States for non-network broadcast. In addition, it may be distributed to foreign television stations while it is appearing over a domestic television network. The

distribution of a television program to individual stations for non-network broadcast is known as syndication. NBC has obtained syndication and other valuable subsidiary program rights, as well as a share of the profits produced by such rights, with respect to a substantial number of television entertainment programs produced by others and broadcast on the NBC Television Network. In 1973, NBC sold its syndication rights to NTA Films, Inc., a subsidiary of National Telefilm Associates, Inc.

13. The use of motion picture feature films as prime time television entertainment programs has shown a marked increase in recent years. In the early nineteen sixties, the three nationwide commercial television networks began using feature films in prime time. By the 1967-1968 season, each network generally carried motion picture feature films on two nights a week, usually from 9:00 to 11:00 p.m. EST, and feature films were thus available to television network audiences six nights a week. This practice has continued to date. In 1966, NBC contracted with MCA, Inc., for the production of motion picture feature films for exhibition on the NBC Television Network. In 1967, both CBS and ABC announced plans to produce feature-length motion picture films and to distribute those films for exhibition in motion picture theaters and for exhibition on their respective television networks.

14. The successful production of both television entertainment programs and feature films depends to a large degree on the utilization of skilled writers, actors, directors, producers and related talent. Only the three nationwide commercial television networks can assure such talent both television and theatrical exposure for the talent and its product. In addition, because of their control over access to their affiliates, the networks are in a unique position to assure themselves of nationwide television network revenues for feature films which they produce, after those films have completed theatrical runs.

## V

## OFFENSES CHARGED

15. For many years prior to the date hereof and continuing up to and including the date of filing of this complaint, defendant NBC has engaged in a combination with its owned and operated television stations, the NBC affiliates and others, and has entered into contracts, in unreasonable restraint of trade and commerce in television entertainment programs exhibited on the NBC Television Network during prime evening hours, in violation of Section 1 of the Sherman Act.

16. For many years prior to the date hereof and continuing up to and including the date of filing of this complaint, defendant NBC has engaged in a combination with its owned and operated television stations, the NBC affiliates and others to monopolize, has attempted to monopolize and has monopolized the trade and commerce in television entertainment programs exhibited on the NBC Television Network during prime evening hours, in violation of Section 2 of the Sherman Act.

17. Pursuant to said offenses, defendant NBC has used its control over access to the broadcasting time of the NBC Television Network during prime evening hours:

(a) To exclude television entertainment programs in which NBC had no ownership interest from broadcast on the NBC Television Network during prime evening time;

(b) To compel outside program suppliers to grant to it financial interests in television entertainment programs produced by them;

(c) To refuse to offer program time alone to advertisers and other outside program suppliers;

(d) To control the prices paid by NBC for television exhibition rights to motion picture feature films distributed by non-network motion picture distributors;

(e) To obtain a competitive advantage over other producers and distributors of television entertainment programs and of motion picture feature films.

18. The offenses alleged in this complaint are continuing and will continue unless the relief hereinafter prayed for is granted.

## VI

## EFFECTS

19. The effects of the aforesaid offenses, among others, have been and are as follows:

(a) Ownership and control of television entertainment programs broadcast during prime evening hours on the NBC Television Network has been concentrated in defendant NBC;

(b) Competition in the production, distribution and sale of television entertainment programs, including feature films, has been unreasonably restrained;

(c) Competition in the sale of television entertainment programs to the NBC Television Network by outside program suppliers of said programs has been unreasonably restrained;

(d) The viewing public has been deprived of the benefits of free and open competition in the broadcasting of television entertainment programs.

## PRAYER

WHEREFORE, the plaintiff prays:

1. That the offenses described in paragraph 15 of this complaint be adjudged and decreed to be in violation of Section 1 of the Sherman Act.

2. That the offenses described in paragraph 16 of this complaint be adjudged and decreed to be in violation of Section 2 of the Sherman Act.

3. That the defendant NBC be prohibited from obtaining any interest (except for the first-run right of exhibition) in television entertainment programs produced by others, including feature films.

4. That the defendant NBC be prohibited from engaging in syndication of any television entertainment programs.

5. That the defendant NBC be prohibited from transmitting for exhibition over the NBC Television Network any television entertainment programs, including feature films, produced by the defendant NBC or any other commercial television network, and from allowing any television entertainment programs produced by NBC to be transmitted over any other commercial television network.

6. That the defendant NBC be prohibited from using its control of access to the broadcasting time of the NBC Television Network, the NBC owned and operated television stations or the NBC affiliates, to foreclose competition or obtain an unfair competitive advantage in any other field.

7. That the plaintiff have such other relief by way of divorcement, divestiture, reorganization and injunction with respect to the business and properties of the defendant NBC as the Court may consider necessary or appropriate to dissipate the effects of the defendant's unlawful activities as hereinbefore

alleged in this complaint, and to restore competitive conditions to the television entertainment program industry.

8. That the plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

9. That the plaintiff recover the costs of this action.

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## APPENDIX C

| ENTERED |
| --- |
| NOV. 28, 1977 |
| CLERK, U.S. DISTRICT COURT |
| CENTRAL DISTRICT OF CALIFORNIA |
| By Deputy |

| FILED |
| --- |
| NOV. 23, 1977 |
| CLERK, U.S. DISTRICT COURT |
| CENTRAL DISTRICT OF CALIFORNIA |
| By Deputy |

# UNITED STATES DISTRICT COURT
# CENTRAL DISTRICT OF CALIFORNIA

| | |
| --- | --- |
| UNITED STATES OF AMERICA, *Plaintiff,* v. NATIONAL BROADCASTING COMPANY, INC., *Defendant.* | CV NO. 74-3601-RJK FINAL JUDGMENT |

Plaintiff, United States of America, having filed its complaint herein on December 10, 1974, and defendant, National Broadcasting Company, Inc., having filed its answer herein on December 30, 1974, by their respective attorneys, each having consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or admission by any party with respect to any issue of fact or law in any action or proceeding;

NOW, THEREFORE, before any testimony has been taken, the Court being advised and having considered the matter, it is hereby:

ORDERED, ADJUDGED AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim upon which relief may be granted against defendant under the provisions of Sections 1 and 2 of the Act of Congress of July 2, 1890, 15 U.S.C. §§ 1, 2, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," as amended, commonly known as the Sherman Act.

II.

As used in this Final Judgment:

(A) "Person" means an individual, partnership, corporation or any other form of legal or business entity.

(B) "NBC" means the National Broadcasting Company, Inc. and its subsidiaries.

(C) a "person controlling NBC" means any person owning at least ten percent (10%) of, or a controlling share of, the outstanding voting stock of NBC.

(D) "NBC Television Network" means an NBC owned or operated business which provides television programs and related advertising messages to affiliated television broadcast stations.

(E) "Entertainment Program" means any program, including a feature film, exhibited or intended to be exhibited on television other than the following programs: news, public affairs, agricultural, religious, instructional, and sports (as those terms are defined in Appendix A to this Final Judgment). The inclusion of incidental or occasional entertainment or non-

entertainment elements in a program or program series shall not be deemed to change the classification of the program or program series.

(F) "Independent Program Supplier" means a person who produces or offers one or more entertainment programs for network exhibition, other than NBC, a person controlling NBC, or a person in which NBC or a person controlling NBC has an ownership interest.

(G) "Network Exhibition" means the initial and repeat exhibitions of a television program on the NBC television network during the term of any agreement between NBC and an independent program supplier for such exhibition of such program.

(H) "Prime Time Hours" means the hours from 6:00 p.m. to 11:00 p.m. in the Eastern and Pacific Time Zones of the United States, and the hours from 5:00 p.m. to 10:00 p.m. in the Central and Mountain Time Zones of the United States.

(I) "Daytime Hours" means the hours from 9:00 a.m. to 6:00 p.m. in the Eastern and Pacific Time Zones of the United States, and the hours from 9:00 a.m. to 5:00 p.m. in the Central and Mountain Time Zones of the United States.

(J) "Fringe Hours" means the hours from 11:00 p.m. to 2:00 a.m. and 6:00 a.m. to 9:00 a.m. in the Eastern and Pacific Time Zones of the United States, and the hours from 10:00 p.m. to 1:00 a.m. and 6:00 a.m. to 9:00 a.m. in the Central and Mountain Time Zones of the United States.

(K) "Television Broadcast Station" means a station licensed as a television broadcast station by the Federal Communications Commission.

(L) "NBC Production Facilities" means studio facilities, including but not limited to, scenery, props and other produc-

tion equipment, which are used for the production of entertainment programs exhibited or intended to be exhibited on television, and which are owned or leased by NBC, by any person controlling NBC, or by any person in which NBC or any person controlling NBC has any ownership interest.

(M) "Stripping" means the broadcasting of more than one (1) episode per week of a television program series.

(N) "Broadcast Year" means the television broadcast year customarily commencing in September of one year and continuing until September of the following year.

III.

The provisions of this Final Judgment are applicable to NBC, to any person controlling NBC and to each of NBC's directors, officers, agents, employees, subsidiaries, successors, and assigns, and to all persons in active concert or participation with any of them, who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

NBC is enjoined and restrained from:

(A) Acquiring any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by an independent program supplier, other than the right to the Network Exhibition of the program, except as provided in Sections VIII(A)-(D) of this Final Judgment, *provided that* an agreement granting NBC the right to Network Exhibition may include provisions concerning subject matters incident to the licensing and use of network programs, of which the following are examples: geographic scope and manner of transmission

and delivery of network broadcasts; approval of creative elements and program content; technical quality and delivery requirements; union and Equal Employment Opportunity Act compliance; act of God; force majeure; preemptions; obligation to pay for, rather than play, programs; number of episodes or programs ordered; assignability; warranties; indemnification; completion bonds; security agreements and financing statements; insurance; public morals; advertising conflicts; advertising, promotion and publicity of programs; audience testing and screening; cancellation; exclusivity for talent and creative personnel; exclusive exhibition rights (except as limited by Sections VI(E)(ii)-(iii) herein); pilots (except as limited by Section VI(F) herein); options (except as limited by Sections VI(E)(i), VI(F) and VI(G) herein); first negotiation and first refusal rights (except as limited by Sections VI(E)(i) and VI(G) herein); spinoffs (except as limited by Section VI(G) herein); repeats (except as limited by Section VI(H) herein); same day protection against once weekly syndication programs and theatrical feature films; title protection for the length of the applicable contract or contracts; format and continuing character protection; breach; and remedies, so long as any such provision does not violate the antitrust laws.

(B) Selling, licensing, or distributing entertainment programs to television broadcast stations for non-network television exhibition (or otherwise engaging in the business commonly known as "syndication"), or to foreign television stations or networks, except as provided in Section VIII(D) of this Final Judgment.

V.

(A) NBC is enjoined and restrained for a period of ten (10) years from the effective date of this Section from offering for NBC network broadcast during Prime Time Hours, Day-

time Hours or Fringe Hours, more than two and one-half (2½) hours per week in Prime Time Hours, more than eight (8) hours per week in Daytime Hours, and more than eleven (11) hours per week in Fringe Hours, determined on the average per compliance period, of entertainment programs obtained from sources other than independent program suppliers, *provided that* during each compliance period NBC may add to the total number of allowable hours of entertainment programming from sources other than independent program suppliers, two (2) non-regularly scheduled special programs, and *provided further that* in any compliance period, NBC may, during Fringe Hours, increase the number of allowable hours of entertainment programming from sources other than independent program suppliers by reducing to the same extent the number of allowable hours of such programming in Prime Time Hours and/or Daytime Hours.

(B) For purposes of this Section V, compliance periods shall be consecutive semi-annual periods commencing at the start of each broadcast year. Compliance reports in the form set forth in Appendix B to this Final Judgment shall be submitted by NBC to plaintiff within thirty (30) days following the conclusion of each compliance period.

VI.

NBC is enjoined and restrained:

(A) From purchasing or offering to purchase from an independent program supplier the right to Network Exhibition of one or more entertainment programs upon the condition, express or implied, that NBC, or any person controlling NBC, will obtain any other right or interest from said supplier, except as to contractual provisions concerning subject matters incident to the licensing and use of network programs as provided in Section IV(A) of this Final Judgment.

(B) For a period of fifteen (15) years from the effective date of this Section, from purchasing or offering to purchase from an independent program supplier any right to the exhibition of a program, other than a live program, as an NBC television network entertainment program upon the condition, express or implied, that said supplier produce the program, in whole or in part, utilizing NBC production facilities.

(C) For a period of fifteen (15) years from the effective date of this Section from agreeing with an independent program supplier that said supplier use NBC production facilities to produce a program, other than a live program, as an NBC television network entertainment program for a period in excess of the time required to produce episodes for one (1) broadcast year, *provided that* NBC and said supplier are not precluded each year from negotiating and contracting for additional periods not to exceed one (1) year each.

(D) For a period of ten (10) years from the effective date of this Section from purchasing or offering to purchase from CBS Inc. ("CBS") or American Broadcasting Companies, Inc. ("ABC") any right to Network Exhibition of any entertainment program upon the condition, express or implied, that CBS or ABC agrees to purchase or offers to purchase a right to network exhibition of any entertainment program produced or controlled by NBC.

(E) For a period of fifteen (15) years from the effective date of this Section from:

> (i) Acquiring from an independent program supplier options for Network Exhibition of a prime time network entertainment program series exercisable for a period in excess of four (4) years from the date of first broadcast of an episode of such program as part of an NBC prime time television network entertainment program series, and the balance of any broadcast year in which such four (4) year

period ends, *provided that* nothing herein shall prevent NBC, after the date of first broadcast, from negotiating new provisions which may include the purchase of an extension of the option period to five (5) years from the date of first broadcast, and the balance of any broadcast year in which such five (5) year period ends, and, at the end or during the final year of any contract term, from negotiating for and entering into new agreements with said supplier so long as the options acquired under any such new agreements do not exceed a period of four (4) years from the date of first broadcast of an episode under such new agreements, and the balance of any broadcast year in which such four (4) year period ends, plus the right to negotiate for and acquire a fifth option year, and *provided further that* nothing herein shall prevent NBC from acquiring first negotiation and first refusal rights for new agreements with said supplier so long as any such first refusal rights shall not be more favorable to NBC than a contractual obligation which prevents said supplier from entering into an agreement with a person other than NBC on terms less favorable to said supplier than said supplier's last offer to NBC without giving NBC the first opportunity to meet such terms, and *provided further that* nothing herein shall prevent NBC from entering into contractual provisions incident to the licensing and use of network programs as provided in Section IV(A) of this Final Judgment.

(ii) Acquiring from an independent program supplier, after thirty (30) days from the entry of this Final Judgment, exclusive exhibition rights for prime time network entertainment program series episodes for which NBC has exercised a contractual right to Network Exhibition, in excess of the following:

(a) for prime time use, the duration of any contract term or terms by which NBC acquires the right to Network Exhibition;

(b) for non-prime time stripping on television broadcast stations, four (4) years from the first prime time episode broadcast; and

(c) for all other broadcast uses, three (3) years from the first prime time episode broadcast,

*provided that* nothing herein shall prevent NBC from negotiating for and acquiring rights, including exclusive rights, for stripping and once weekly exhibition to be utilized after the periods of exclusivity set forth above, so long as negotiation for and acquisition of such rights takes place after NBC has agreed to order episodes of such program for the first year of broadcast as an NBC prime time television network entertainment program series, and *provided further that* nothing herein shall prevent NBC from acquiring exclusive exhibition rights to series episodes for the broadcast year for which such episodes are ordered.

(iii) Acquiring from an independent program supplier, after thirty (30) days from the entry of this Final Judgment, exclusive exhibition rights for theatrical feature films for which NBC has a contractual right to Network Exhibition, against:

(a) theatrical and non-theatrical direct projection;

(b) closed circuit TV in non-residential hotels, motels, bars, restaurants, hospitals and similar non-residential institutions;

(c) passenger-carrying vehicles;

(d) video discs, cartridges or cassettes or other such equipment.

(F) For a period of ten (10) years from the effective date of this Section, from acquiring from an independent program supplier a first year pick-up option for exhibition of a prime time network entertainment program series based on a program designated by NBC and said supplier as a "pilot program" ("pilot") which is exercisable after the following times:

(i) where NBC has not advanced said supplier any part of the costs of pilot development, subsequent to the earliest date that the agreement contemplates that broadcast of the series may commence; and

(ii) where NBC has advanced said supplier any part of the costs of pilot development, more than one (1) year after delivery to NBC of the completed pilot, *provided that* as to those series which NBC does not include in the network schedule at the earliest date that the agreement contemplates that broadcast of the series may commence:

(a) for those pilots which have been delivered to NBC between October 2 of one year and April 1 of the following year, NBC must designate by June 1 of the latter year sixty-five percent (65%) of such pilots as to which NBC will release its option for series exhibition upon payment to NBC of all of NBC's unrecouped costs for the development of such pilots; and

(b) for those pilots which have been delivered to NBC between April 2 and October 1 of the same year, NBC must designate by January 1 of the following year sixty-five percent (65%) of such pilots as to which NBC will release its option for series exhibition upon payment to NBC of all of NBC's unrecouped costs for the development of such pilots;

and *provided further that* NBC may purchase additional first year pick-up options for series which NBC has not designated

for release and for series which NBC has designated for option release but which NBC wishes to retain, so long as such additional options are acquired, for pilots described in Section VI(F)(ii)(a), after June 1, or after the announcement of the NBC television network schedule for the next broadcast year, whichever is later, and, for pilots described in Section VI(F)(ii)(b), after December 1, and so long as such additional options do not exceed increments of six (6) months.

For purposes of this Section VI(F):

A pilot shall be deemed to have been delivered to NBC when NBC has received, in the case of a film pilot, an answer print, and, in the case of a tape pilot, a program complying with customary tape requirements.

In computing the number of pilots to be released under Sections VI(F)(ii)(a) and (b), any fraction of a pilot shall be rounded off to the next lower whole number.

Unrecouped costs shall be deemed to be the amount of money advanced by NBC to an independent program supplier for the development of a pilot, except that if the NBC television network broadcasts a pilot once, two-thirds (⅔) of NBC's costs shall be deemed to have been recouped, and if NBC broadcasts a pilot more than once, all of NBC's costs shall be deemed to have been recouped.

(G) For a period of ten (10) years from the effective date of this Section, from acquiring from an independent program supplier rights in excess of first negotiation and first refusal rights for a spinoff involving a non-continuing character.

For purposes of this Section VI(G):

First refusal rights shall not be more favorable to NBC than a contractual obligation which prevents said supplier from entering into an agreement with a person

other than NBC on terms less favorable to said supplier than said supplier's last offer to NBC without giving NBC the first opportunity to meet such terms.

A non-continuing character shall be deemed to mean one who appeared in no more than twenty-five percent (25%) of the original episodes of the program upon which such spinoff is based during the twelve (12) months prior to the time exhibition rights to such spinoff are offered for licensing by said supplier.

(H) For a period of ten (10) years from the effective date of this Section, from purchasing from an independent program supplier a right to first run Network Exhibition of any television entertainment program series which includes the right to exhibit repeats of episodes in years subsequent to the broadcast year of initial exhibition of such episodes, *provided that* repeat rights to three (3) initial episodes per broadcast year of each such program series may be purchased for exhibition in subsequent broadcast years as part of the right to Network Exhibition, and *provided further that* additional rights to repeats may be purchased for exhibition in subsequent broadcast years, so long as negotiation for and acquisition of such additional repeat rights takes place after NBC has agreed to order episodes of such program series for the first year of broadcast as an NBC television network entertainment program series, and *provided further that* the limitation as to the use of repeats contained in this Section VI(H) shall not apply to (i) made-for-television and theatrical feature films, (ii) specials, and (iii) cartoons or other children's programs.

## VII.

The following Sections of this Final Judgment shall not take effect until similar injunctive relief is obtained in Final Orders, Judgments or Decrees entered against CBS in *United*

*States* v. *CBS Inc.*, Civil Action No. 74-3599-RJK (C.D. Cal.), and against ABC in *United States* v. *American Broadcasting Companies, Inc.*, Civil Action No. 74-3600-RJK (C.D. Cal.) which are not appealable or from which no timely appeal is taken: V, VI(C), VI(E)(i), and VI(F) through (H).

VIII.

Nothing contained in this Final Judgment shall be construed:

(A) To prohibit NBC from acquiring rights for non-network broadcast of programs by NBC owned and operated television broadcast stations where such rights are not acquired, directly or indirectly, in connection with the negotiation for or acquisition of rights including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program.

(B) To prohibit NBC from seeking repayment, in whole or in part, of money or other consideration loaned, advanced or furnished by NBC in connection with the development or production of a television network program or of a project or activity that may result in a television network program, to the extent of the amount loaned, advanced or furnished, including interest.

(C) To prohibit NBC from acquiring rights with respect to non-broadcast uses, including but not limited to publication of books or music, where such rights are not acquired, directly or indirectly, in connection with the negotiation for or acquisition of rights, including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program.

(D) To prohibit NBC from selling, licensing, or distributing outside the United States programs (i) produced in

foreign countries and not included in NBC's television network schedule, where the acquisition of such distribution rights is not conditioned, directly or indirectly, upon the negotiation for or acquisition of rights, including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program, or (ii) produced by NBC, by any person controlling NBC, or by any person in which NBC or any person controlling NBC has any ownership interest.

IX.

If a Final Order, Judgment or Decree is entered with respect to CBS in *United States* v. *CBS Inc.*, Civil Action No. 74-3599-RJK (C.D. Cal.), or with respect to ABC in *United States* v. *American Broadcasting Companies, Inc.*, Civil Action No. 74-3600-RJK (C.D. Cal.), which is not appealable or from which no timely appeal is taken, which shall order or decree for either CBS or ABC injunctions different in terms or provisions than those required by this Final Judgment, or which shall result in the dismissal of either or both of such actions, NBC may apply to the Court and shall be granted a modification of or relief from any terms set forth herein as may be necessary to prevent NBC from being placed at a competitive disadvantage with respect to CBS or ABC.

X.

(A) Within thirty (30) days after the entry of this Final Judgment, NBC shall furnish to its officers, directors, and appropriate employees and agents a copy of this Final Judgment, and each year for a period of ten (10) years thereafter NBC shall furnish a copy to all new officers, directors and appropriate employees and agents. NBC shall maintain a file listing all persons to whom it has furnished such copies.

(B) Within thirty (30) days after entry of this Final Judgment and once each year during the succeeding ten (10) calendar years following entry of this Final Judgment, NBC shall send a copy of this Final Judgment to the last known address of each independent program supplier known to have offered any entertainment program to NBC for inclusion in its schedule of NBC television network programs within the preceding five (5) years and to each person listed in the then current issue of Television Factbook as a provider of television production facilities.

XI.

(A) For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to NBC made to its principal office, shall be permitted, subject to any legally recognized privilege:

(1) access during the office hours of NBC to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of NBC relating to any matter contained in this Final Judgment; and

(2) subject to the reasonable convenience of NBC and without restraint or interference by it, the right to interview officers or employees of NBC, who may have counsel present, regarding any such matter.

(B) NBC, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, made to its principal office, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be requested.

No information obtained by the means provided in this Section XI shall be divulged by any representative of plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XII.

Jurisdiction is retained by this Court for the purpose of enabling either party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

XIII.

Entry of this Final Judgment is in the public interest.

Dated: November 28, 1977

ROBERT J. KELLEHER

*United States District Judge*

## APPENDIX A*

(a) "Agricultural programs" include market reports, farming, or other information specifically addressed, or primarily of interest, to the agricultural population.

(b) "News programs" include reports dealing with current local, national, and international events, including weather and stock market reports; and when an integral part of a news program, commentary, analysis, and sports news.

(c) "Public affairs programs" include talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables, and similar programs primarily concerning local, national, and international public affairs.

(d) "Religious programs" include sermons or devotionals; religious news; and music, drama, and other types of programs designed primarily for religious purposes.

(e) "Instructional programs" include programs (other than those classified under Agricultural, News, Public Affairs, Religious or Sports) involving the discussion of, or primarily designed to further an appreciation or understanding of, literature, music, fine arts, history, geography, and the natural and social sciences; and programs devoted to occupational and vocational instruction, instruction with respect to hobbies, and similar programs intended primarily to instruct.

(f) "Sports programs" include play-by-play and pre- or post-game related activities and separate programs of sports instruction, news or information (e.g., fishing opportunities, golfing instructions, etc.).

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* Taken from 47 C.F.R. § 73.670, n.1 (1975).

## APPENDIX B

## COMPLIANCE REPORT

## NBC PRODUCED PROGRAMS

Compliance Period _____
No. weeks_____

### Prime Time Hours

**Entertainment:**

| Program Name | No. Minutes Per Week | No. Weeks Offered For Network Broadcast |
|---|---|---|

**Non-Entertainment:**

| Program Name | No. Minutes Per Week | No. Weeks Offered For Network Broadcast |
|---|---|---|

### Daytime Hours

**Entertainment:**

| Program Name | No. Minutes Per Week | No. Weeks Offered For Network Broadcast |
|---|---|---|

**Non-Entertainment:**

| Program Name | No. Minutes Per Week | No. Weeks Offered For Network Broadcast |
|---|---|---|

## Fringe Hours

**Entertainment:**

| Program Name | No. Minutes Per Week | No. Weeks Offered For Network Broadcast |
|---|---|---|

**Non-Entertainment:**

| Program Name | No. Minutes Per Week | No. Weeks Offered For Network Broadcast |
|---|---|---|

**APPENDIX D**

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**CIVIL MINUTES — GENERAL**

Case No. CV74-3601-RJK Date: November 30, 1977

Title: United States of Americ.. v. National Broadcasting Co., Inc.

DOCKET ENTRY

PRESENT: HON. ROBERT J. KELLEHER, JUDGE

| Joseph Levario | N/A |
|---|---|
| Deputy Clerk | Court Reporter |

| ATTORNEYS PRESENT FOR PLAINTIFFS: | ATTORNEYS PRESENT FOR DEFENDANTS: |
|---|---|
| N/A | N/A |

PROCEEDINGS: Motion of Columbia Pictures to intervene.

The motion of Columbia Pictures to intervene, having been taken under submission as of August 12, 1977, is hereby denied.

# APPENDIX E

ENTERED
JAN 27 1978
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Deputy

FILED
JAN 26 1978
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Deputy

## UNITED STATES DISTRICT COURT
## CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
*Plaintiff,*

v.

NATIONAL BROADCASTING COMPANY, INC.,
*Defendant.*

Civil No. 74-3601-RJK

MEMORANDUM OF DECISION RE CONSENT DECREE

### I. Introduction

The government's complaint against National Broadcasting Company ("NBC"), alleging violations of the Sherman Act, was filed on December 10, 1974. NBC answered the complaint on December 30, 1974, and the action thereafter proceeded through various stages of discovery and pretrial motions. On November 17, 1976, presumably upon the completion of extensive negotiations, the government and NBC submitted to the Court a proposed final judgment by consent which, upon approval by the Court, resolves all claims between the parties and concludes the litigation.

Because this is a civil antitrust lawsuit brought by the United States, the terms and conditions of the *Antitrust Proce-*

*dures and Penalties Act* ("APPA") apply. See 15 U.S.C. § 16 (1977 Supp.). APPA provides that the government must publish any proposed consent judgment and receive public comments thereto and that before the Court may approve such a judgment, *it must determine that such judgment is in the public interest.* The Act authorizes, but does not require, the Court to adopt certain procedures to aid in its determination of the public interest question.

The proposed consent judgment and the competitive impact statement ("CIS") were published in the Federal Register on November 24, 1976; additionally, summaries of the judgment were published in local newspapers in the District of Columbia and Los Angeles, California. Thereafter the Court and the government received numerous comments on the judgment, and in due course the government responded to these comments, publishing all relevant documents in the Federal Register on May 16, 1977. Based on the comments received, certain changes were made in the proposed judgment, and on May 4, 1977, NBC and the government submitted to the Court an amended proposed final judgment. Now that the requirements of the APPA concerning publication and consideration of public comments have been satisfied, the matter is ripe for a judicial determination of whether the proposed judgment is in the public interest.

**II. Background and Complaint**

This litigation was commenced by the government in April of 1972 when it filed separate but similar complaints against ABC, CBS and NBC. Upon a motion by defendants to dismiss the actions on the ground that there had been noncompliance by the plaintiff with certain orders of Court, the Court, on November 13, 1974, dismissed the original actions without prejudice. Thereafter, on December 10, 1974, the government filed new complaints, again alleging the same violations of the

Sherman Act as contained in the original complaint. These new complaints survived a repeated defense motion to dismiss on grounds of unconstitutional prosecutorial purpose and the case proceeded through discovery in pretrial proceedings. The Court also denied three other significant motions made on behalf of the defendants: (1) a motion for summary judgment on the Sherman Act claims; (2) a motion to dismiss on the ground of exclusive jurisdiction in the Federal Communications Commission; and (3) a motion to dismiss without prejudice or to stay on the ground of primary jurisdiction in the Federal Communications Commission.

The complaint alleges violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1970), in connection with NBC's practices and activities in producing, procuring, and distributing prime-time television programs. In general, the complaint challenges the control exerted by NBC over the production, acquisition and exhibition of television programs shown during the prime-time hours. To comprehend the allegations of the complaint, it is necessary to understand, at least on a rudimentary basis, the manner in which NBC procures and exhibits its prime-time television programming.

Of approximately 700 television stations in the United States which broadcast commercial television programs, about 200 stations have affiliation agreements with NBC. During prime-time evening hours, these stations depend upon NBC for virtually all of their television programs. In addition to the affiliated stations, NBC owns and operates stations in five of the nation's leading television markets—New York, Los Angeles, Chicago, Washington, and Cleveland. The government contends that with the power derived from its control over the owned and affiliated stations, NBC has monopolized the trade in commerce of production of prime-time television programming shown on the NBC network, has attempted to monopolize such market, and has entered into combinations and agreements in restraint of trade, particularly as it contracts for the purchase of programs produced by independent producers.

Most of the programs shown on the NBC network have been produced either by NBC itself or by independent producers who sell rights, including the right of exhibition, to NBC. One of the practices challenged by the government in this action is NBC's custom of purchasing from independent program producers various rights in addition to the right of exhibition. The value of a television program is not exhausted by its first network showing. After the completion of its run on network television, a program may be distributed to individual television stations for non-network broadcast. It also may be distributed to foreign television stations for broadcast while appearing at the same time over a domestic television network. This distribution to individual stations for non-network broadcasting is known as syndication. The government contends that for a substantial number of programs produced by independent producers, NBC acquires the syndication rights and thereby derives a substantial portion of the ultimate profits produced by a television program. The government contends that NBC is able to purchase these valuable subsidiary rights from independent program producers because of its control of access to the NBC television network, and since CBS and ABC pursue the same practice, independent program producers must deal on network terms or not deal at all.

The complaint also focuses on the relationship between NBC and advertisers. At one time in the television industry, it was not uncommon for an advertiser to purchase air time from the networks and to purchase television programs from outside program suppliers for broadcast during such air time. The advertisers thus constituted a substantial market for the income of program producers and served as buyers in competition with the networks. The complaint charges that NBC now will not sell air time to advertisers for the exhibition of a television program, but will sell only time for commercial messages, broadcast in conjunction with a program already selected by

NBC. It is claimed this practice has removed advertisers as a competitive force in the purchase and sale of television programming and has left the three networks as the primary market for outside program suppliers.

It is charged that in furtherance of this monopoly over the market of television programming shown on its network, NBC has engaged in the following acts:

(a) excluded television programs in which NBC had no ownership interest from broadcast on the network during prime-time hours;

(b) compelled outside program suppliers to grant to it financial interest in television programs produced by them;

(c) refused to offer program time to advertisers and other outside program suppliers;

(d) controlled the prices paid by NBC for the exhibition rights to motion picture feature films distributed by non-network distributors; and

(e) as a producer of programs itself, obtained a competitive advantage over other producers and distributors of television programs and motion picture feature films.

It is claimed the effects resulting from these acts are:

(a) ownership and control of television programs shown during prime evening hours on the television network are concentrated in NBC;

(b) competition in the production, distribution and sale of television programs has been unreasonably restrained;

(c) competition in the sale of television programs to NBC by outside program suppliers has been unreasonably restrained; and

(d) the viewing public has been deprived of the benefits of free and open competition in the broadcasting of television entertainment programs.

The complaint prays for the following relief:

(1) that NBC be prohibited from obtaining any interest except for the first-run right of exhibition in television programs produced by others;

(2) that NBC be prohibited from engaging in syndication of any television programs;

(3) that NBC be prohibited from transmitting over its television network any television program, including feature films, produced by NBC or any other commercial television network, and from allowing any NBC-produced program from being transmitted over CBS or ABC networks; and

(4) that NBC be prohibited from using its control of access to broadcasting time on the NBC network to foreclose competition or obtain an unfair competitive advantage in any other field.

In summary, the complaint focuses on three basic aspects of business within the NBC television network: (a) the terms and conditions on which NBC purchases television programs and feature length films from independent producers and suppliers; (b) the terms of access to the NBC television network; and (c) NBC's production of its own television programming and films.

**III. Terms of the Consent Judgment**

Discussion of the terms of the proposed judgment and the relief provided therein follows the organization of the judgment itself. The judgment addresses various practices of NBC, and review of the judgment by subject matter will facilitate later consideration of objections lodged against the judgment.

(a) *Financial Interest and Syndication*

Section IV of the proposed judgment prohibits NBC from acquiring syndication and other distribution or profit shares in television programs produced by others. Thus, in negotiating the purchase of television programs from independent producers and suppliers, NBC would be permitted to acquire only the right of first-run exhibition and certain rights incident to the licensing and use of programs. The network would be prohibited from acquiring "financial interests" in a television program produced by an outside source which would earn revenues and profits for NBC beyond the network run of the program. Syndication is the most significant of these secondary rights, and NBC would be prohibited from acquiring any domestic syndication rights. The judgment permits foreign syndication of NBC-produced programs and certain foreign programs.

The relief provided for in this section of the judgment parallels the restrictions placed on all three television networks by the FCC's financial interest and syndication rules.

(b) *Internal Production of Programs*

Section V of the judgment places restrictions on NBC's ability to exhibit on the NBC network television programs which it has produced. For a period of ten years, NBC is restrained from broadcasting on the NBC network more than two and one-half hours per week in prime-time hours, eight hours per week in daytime hours, and eleven hours per week in fringe-hours television programs which it has produced itself. Thus, for those hours set aside for non-NBC-produced programming, NBC would be required to obtain the programs from independent program suppliers. This provision does not take effect until similar relief is obtained against CBS and ABC in the ongoing litigation.

(c) *Terms and Conditions of Program Purchases*

A substantial portion of the programs exhibited on the NBC network are purchases from independent program suppliers. Section VI of the judgment imposes on NBC various restrictions on the terms and conditions it may seek in contracting with independent program suppliers for the purchase of television programming.

(d) *Subsidiary Rights*

NBC is prohibited from purchasing or offering to purchase exhibition rights to an independent program supplier's program on the condition that the supplier would grant NBC any right or interest other than those incident to network licensing and use of the program. This prohibition reinforces the restriction on NBC in acquiring syndication and other financial interest rights in a television program.

(e) *NBC Production Facilities*

For a period of fifteen years, NBC is prohibited from purchasing or offering to purchase from an independent program supplier the right of exhibition of a television program on the condition that such supplier produces the program, in whole or in part, by utilizing NBC's production facilities.

(f) *Facilities, Contracts*

For a period of fifteen years, NBC is prohibited from contracting with an independent program supplier for the use of NBC production facilities for a period in excess of the time required to produce episodes for one broadcast year, provided however that the parties at the end of each year may renew the contract for one additional year. This provision precludes NBC from requiring independent program producers to enter into long-term contracts for the use of NBC's production facilities. This provision will not take effect until similar relief is obtained against CBS and ABC.

(g) *Reciprocal Dealing*

To preclude NBC from avoiding the limitation on internal production, this section would prohibit NBC from engaging in reciprocal dealing with CBS or ABC, by prohibiting NBC from purchasing exhibition rights of any television programs produced by CBS or ABC on the condition that CBS or ABC purchase similar rights from NBC. This restriction applies for a period of ten years.

(h) *Exclusive Rights*

This provision of the judgment imposes ceilings on certain exclusive rights that NBC may acquire from independent program suppliers in connection with the purchase of exhibition rights for a television program.

(i) *Options*

This provision is designed to restrict NBC's ability to obtain exclusive rights to a program series developed and produced by an independent supplier for as long as seven years. Since in most cases contracts between NBC and independent suppliers for the production and television exhibition of programs are entered into before the program has been developed, under its present practice NBC can obtain exclusive exhibition rights to a program series for up to seven years at a point when the independent producer can merely speculate as to the program's popularity and value. This provision prohibits NBC from including in its contracts with producers exclusive yearly options for more than four years, plus a single year's extension if the contract is renegotiated. If NBC wished to extend its exclusive network exhibition right beyond this initial five-year period, it would have to negotiate a new contract at or near the end of the first contract. With respect to acquiring first negotiation or first refusal rights for new agreements with the supplier, the permissible first refusal rights which NBC could acquire may not prohibit the program supplier from entering

into a new contract at the end of any contract term with someone else if the terms were equal to or better than the supplier's last offer to NBC. This provision takes effect only if similar relief is obtained against CBS or ABC.

(j) *Exclusive Exhibition Rights*

This provision places limits on the exclusive exhibition rights NBC may acquire from independent program suppliers. First, with respect to prime-time use of a program, NBC may not acquire an exclusive right of exhibition beyond the term of the contract by which NBC acquired the right to network exhibition. Second, NBC may not obtain more than four years of exclusivity as against non-prime-time stripping. "Stripping" is the broadcast of a program series more than once a week after the series has been exhibited on the network. The judgment provides, however, that if NBC has agreed to order episodes of a program for the first year of broadcast as an NBC prime-time program series, it may negotiate for and acquire rights for stripping and once-weekly exhibition to be utilized after the above periods of exclusivity. Third, for all other broadcast use of a program, NBC may not acquire the right of exclusive exhibition for more than three years. NBC remains free to acquire exclusive rights to a series for the broadcast year for which such series is ordered.

(k) *Exclusivity in Feature Films*

This section limits the exclusivity rights NBC may acquire in theatrical feature films. It bars altogether the acquisition of exclusive exhibition rights as against the exhibition of feature films by theatrical and non-theatrical direct projection, on closed circuit television in non-residential hotels, motels, bars, restaurants, and hospitals, or on passenger-carrying vehicles. Additionally, NBC is barred from acquiring exclusive exhibition rights as against use of feature films in discs, cartridges or cassettes.

The original proposed judgment filed with the Court in November of 1976 contained a provision restricting the exclusive rights NBC may acquire as to pay cable television. The provision would have limited NBC to exclusivity for a period of 24 months for two runs of a feature film and an additional 12 months for each subsequent run. In recognition of public comments critical of this provision as an establishment of an industry standard which is anticompetitive, the parties determined to, and did, delete this provision in its entirety. Thus, the amended judgment contains no provision on exclusivity in pay cable television. *See infra.*

(1) *Options on Pilots*

This provision places restrictions on NBC's ability to obtain a first-year pick-up option from an independent program supplier for a program designated by NBC and the supplier as a "pilot program." If NBC has not advanced the supplier any part of the cost of the pilot development, it is prohibited from acquiring a pick-up option exercisable more than one year after delivery to NBC of the pilot. The provision places a further limitation on the exercise of these options. Program selections for each network's new fall season are generally made in the preceding spring, and for the so-called second season replacement, selections are made in the preceding fall. In an attempt to make available those series that have not been selected by NBC for television exhibition, the judgment requires NBC to release its options to 65 percent of such pilots upon the payment to NBC of all its unrecouped costs for the development of such pilots. This provision therefore makes it possible for independent suppliers who have sold pilots to NBC subject to an exclusive one-year option to be relieved of that option so that, upon the pilot being rejected by NBC, the supplier may offer it to other networks or television stations. This provision would not take effect until similar relief is obtained against CBS and ABC.

(m) *Exclusive Rights to Spinoffs*

It is not uncommon for one television series to generate other television programs based on characters of the first; these evolved series are referred to as "spinoffs." This provision of the judgment restricts the rights NBC may acquire in spinoffs. Where the spinoff involves a non-continuing character — that is, a character who appears in no more than 25 percent of the original episodes during the 12 months prior to the time the independent supplier offers exhibition rights for the spinoff — NBC is prohibited from obtaining a contractual option in excess of first negotiation and a limited first refusal right. The first refusal rights permitted cannot prohibit the program supplier from entering into a new contract for the exhibition of the spinoff with someone else if the terms are equal to or better than the supplier's last offer to NBC. This provision would not take effect until similar relief is obtained against CBS and ABC.

(n) *Use of Repeats*

In addition to the rights of exhibition, a television program series also involves repeat rights, by which the network may exhibit the program again after the original showing. This provision limits NBC's use of repeats acquired as part of network exhibition to the same year as that in which initial episodes of the series are broadcast. There are three express exceptions to this prohibition: (1) as to three episodes of each series per year, NBC may rerun them in any subsequent year; (2) once NBC has ordered program series episodes for the first year of broadcast, it may purchase rights to additional repeats for subsequent years without limitation; and thus the general prohibition would be totally voided once NBC has agreed to order episodes of the program series for the first year of broadcast on the NBC network; (3) the limitation on the use of repeats does not apply to (i) made-for-television and theatrical feature films, (ii) specials, and (iii) cartoons or other children's programs. This provision would not take effect until similar relief is obtained against CBS and ABC.

The remaining sections of the judgment concern miscellaneous matters. Section VIII sets forth certain areas of NBC activity which are not disturbed by the judgment. Section IX provides that if a non-appealable judgment is entered dismissing the action against either CBS or ABC or decreeing injunctive relief different from that provided in this judgment, NBC may seek and obtain whatever relief is necessary to prevent it from being placed at a competitive disadvantage with respect to CBS or ABC. The government acknowledges that a provision of this type is unusual in an antitrust judgment, but justifies it on the ground of the unique nature of the television industry. Finally, Section X of the judgment requires NBC to furnish copies of the judgment to all its officers, directors, and appropriate employees and agents, and for ten years to furnish copies to each independent program supplier known to have offered programs to NBC within the preceding five years.

**IV. Objections to the Consent Judgment**

After the original proposed judgment was published in the Federal Register in November of 1976, the government and the Court received numerous comments from interested parties discussing the merits of the proposed judgment. Pursuant to the terms of the APPA, a period of at least ninety days was left open for the submission of public comments. The vast majority of the comments received were in opposition to some or all of the terms of the judgment. This fact probably carries no independent significance since few interested parties would take the time and amass the resources necessary to file favorable comments. The negative comments, however, did direct the Court's attention to possible shortcomings in the proposed judgment, and for that reason were given serious consideration before final approval was given. The interested parties submitting comments on the proposed judgment fall into four general categories: (1) independent program suppliers; (2) CBS and ABC; (3) public interest groups; and (4) members of the pay cable television industry.

A. *Objections of Independent Program Suppliers*

The following independent television producers and suppliers submitted comments in opposition to the proposed judgment: United Artists Corporation, Metro-Goldwyn-Mayer, Inc., Columbia Pictures Industry, Inc., Goodson-Todman Productions, Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, Warner Brothers, Inc., Universal City Studios, Inc., Tandem Productions, Inc., Enterprises, Inc., Lorimar Productions, Inc., and the Caucus of Producers, Writers and Directors, T.A.T. Communications Company, Bud Yorkin Productions, MTM Enterprises, MTM Productions, Inc., and Charles Fries Productions, Inc.

The consensual position taken by the independent program producers and suppliers (hereinafter "independent suppliers") is that the proposed judgment does not go far enough in curtailing and restricting the alleged anticompetitive practices of NBC. The independent suppliers, of course, are the persons and organizations which contract with NBC for the purchase and sale of television programming and as purchasers are interested in obtaining the most favorable terms possible. As the original holders of many of the rights brought into issue by the judgment, these parties have a substantial and obvious financial interest in reduction of the negotiating power of NBC.

The general position taken by the independent suppliers is that the proposed judgment does not require NBC to change in any significant part any of the anticompetitive practices that have placed independent suppliers at a distinct disadvantage. These parties contend that the proposed judgment provides no meaningful relief from the alleged antitrust violations outlined in the government's complaint and urge the Court to decline to give its approval to the judgment.

The following are the specific objections the independent suppliers lodge against the terms of the proposed judgment:

1. *NBC Internal Production*

The independent suppliers object to any internal production of television programming by NBC and object that the limitations placed on NBC's ability to produce programs exhibited on the NBC network is insignificant. It is an uncontested fact that in this respect pursuant to the terms of the judgment NBC will be entitled to more hours of prime-time internally-produced television programming than NBC is in fact presently generating. It appears that now the only prime-time series owned by NBC consumes one hour of time per week. Under the judgment, NBC will be permitted to expand its internal production up to two and a half hours of prime-time viewing per week. The independent suppliers claim that NBC may threaten expansion of internal production in order to obtain more favorable terms in the purchase of programs from the independent suppliers. In response, the government argues that a ceiling on NBC's internal production will prevent it from substantially increasing its internal production and thereby excluding independent program suppliers; the result, in the government's mind, is increased competition in the television program production market.

The major film studios also argue that within the limitation of two and a half hours of prime-time per week, NBC is free to produce internally feature length motion pictures for television exhibition, thereby depreciating the market for films produced by the major studios. The major studios argue that unless NBC's ability to make feature films is restricted, it will continue to use the threat of internal production to keep the price it pays outside feature film suppliers at an artificially low level. These parties, therefore, urge a total ban on NBC internal production.

The position of the independent suppliers is fairly clear—if NBC is removed entirely from the market of television program production, there should be a greater demand for programming supplied by the independent producers and correspondingly less leverage on the part of NBC to extract favorable terms.

The Court has considered whether the presence of NBC as a producer of prime-time television programming will enhance or restrict competition in the television programming production market. The judgment permits limited participation by NBC despite the independent program suppliers' contention that NBC should be excluded altogether as a producer of television programming.

2. *Options*

The terms of the judgment concerning the permissible options NBC may acquire to a program series is a major source of opposition by the independent suppliers. When a network orders a "pilot," it obtains an option for other episodes for the first year of telecast, plus options to order episodes for succeeding years. These options may be purchased when the "pilot" is only in development and thus the price for the option years are established without any true indication of the program's eventual popularity or worth. The judgment limits NBC's acquisition of options to four years, with the right to obtain one additional year if the agreement with the independent supplier is renegotiated.

The independent suppliers complain that this provision does not go far enough in curtailing NBC's use of its negotiating power to extract long term options from the producers. Once again, the issue is whether the relief provided by the judgment [Section VI(E)(i)] is "substantial," as maintained by the government, or merely cosmetic, as maintained by the independent suppliers. The government originally sought a two year limit on the options which NBC could acquire, but

concedes that it was forced to compromise and accept a longer period. One factual dispute arising from these conflicting positions concerns NBC's practice in acquiring options. The government contends that the networks presently obtain initial program options of six or seven years; it consequently characterizes a limitation of four years as "substantial" relief. The independent suppliers, on the other hand, contend that the present industry practice is to obtain options for five years only, and therefore argue that a limitation of four years is not at all substantial. The suppliers also complain that NBC's right to renegotiate for a fifth option year serves no purpose in promoting competition.

The judgment's limitation on options applies only to prime-time programming, prompting some independent suppliers to complain about the lack of any limitation on the option NBC may acquire as to non-prime-time programming. It is noted in this respect, however, that the government's inquiry into network practices originally focused only on prime-time programming.

3. *Exclusivity*

The independent suppliers complain that the various provisions of the judgment relating to the exclusive rights against other television uses which NBC may obtain provide no meaningful relief. The judgment permits NBC to acquire exclusive rights as against other prime-time use of a program series for the duration of the agreement between NBC and a program supplier. The independent suppliers complain that this provision precludes them from licensing older episodes for broadcast to independent stations in the early evening hours. Secondly, the judgment permits NBC to acquire at least four years of exclusivity as against non-prime-time stripping of a program series; the independent suppliers contend that since a producer must usually have at least four years of episodes of a

program before stripping is possible, for all practical purposes, NBC will be able to acquire the same exclusive rights it presently acquires. Thirdly, the judgment permits NBC to obtain exclusive rights as against all other broadcast uses not in excess of three years; the suppliers argue that in the absence of any proof that prime-time ratings of new episodes are adversely affected by showings of older episodes in non-prime-time hours, there is no justification for precluding a program supplier for three years from making whatever use he can during non-prime-time for older episodes of a program. Finally, the suppliers complain that the provision of the judgment that permits NBC to acquire greater exclusive rights than outlined in the judgment if it has agreed to purchase episodes of a program for the first year of broadcast serves no pro-competitive purpose and is without justification.

The limitations on the acquisition of exclusive rights imposed by the judgment is an attempt to even out the bargaining positions of NBC and its independent program suppliers. The government contends that the imposed limitations constitute substantial relief and will have a pro-competitive effect within the television programming market. On the other hand, the independent program suppliers maintain that the decree does not go far enough in restricting the rights which NBC may acquire and that in effect NBC has given up virtually nothing in agreeing to the proposed judgment.

4. *Parallelism*

Section VII of the judgment provides that certain key provisions will not take effect until similar relief is obtained against CBS and ABC. The independent suppliers argue that this provision guarantees that for the future the three networks will be able to offer suppliers of television programs virtually identical terms and conditions. The government's justification for this provision is that, in light of the unique nature of the

television industry, NBC should not be placed at a competitive disadvantage with respect to the other television networks by virtue of its agreement to this proposed judgment.

The gist of the independent suppliers' opposition in this regard is that there is no price competition among the three networks and that this decree fails to alleviate that condition. The government's response is that it recognizes that each network has enormous market power not subject to meaningful competition from the other networks or from non-network stations. Its purpose in bringing these actions was to limit each network's use of its power in purchasing television entertainment programs; it is readily apparent from the face of the complaint and the terms of the consent judgment that the government did not intend directly to foster competition between NBC and CBS or ABC. The proposed judgment must be viewed in light of the government's limited objectives. Apparently the government by the three pending lawsuits chose not to challenge therein the oligopolistic structure of the television industry, but rather, recognizing the immense market power of each network, sought merely to limit the exercise of that individual power and create a situation in which independent program suppliers would be able to obtain more favorable terms than was heretofore possible.

5. *Exclusive Use of Talent*

The government has discovered that a new and growing trend among the networks is to acquire exclusive contracts with talent performers, producers, directors and writers, or to acquire exclusive exhibition rights to literary properties, and then to "lay off" the talent or the property on an independent producer. To "lay off" a talent or property is to assign the contractual rights therefor to an independent program producer in connection with a program production agreement. Once the program is produced, the talent or property reverts back to the

network. In this way the network avoids labeling a program as an "in house" program, but still retains a large degree of control over it. If the network decides not to develop a series from a pilot or to cancel a program series that has been on the air, the independent producer is precluded from attempting to sell the program elsewhere since he cannot obtain either the talent or the literary property to make subsequent episodes of the program. The government also correctly notes that when a single network has an exclusive hold on talent or on a property, no other network can compete for the talent or property in question. Moreover, it seems that, all other things being equal, the network will attempt to fill its scarce air time first with talent and properties to which it holds exclusive contracts.

The independent suppliers oppose entry of the consent judgment on the ground, *inter alia,* that it does not provide any relief from NBC's practice of acquiring exclusive rights to talent or literary properties. The government's response to such an objection is as follows:

> "The government considered various ways of limiting NBC's use of these exclusive contracts in the proposed final judgment, but decided that a specific provision appeared unwarranted at this time. It was decided, therefore, that a satisfactory resolution of this problem was to agree with NBC that further relief under the judgment or by a new action could be sought, if it were later found that NBC had used exclusive contracts so as to impede competition."

By express stipulation, therefore, the parties have left open the question of future relief in regard to the network's practice of acquiring exclusive talent rights.

**B.** ***Objections of CBS and ABC***

Both CBS and ABC have lodged multi-front attacks on the proposed judgment and strenuously urge the Court to withhold its approval. Their objections are summarized below.

1. *The Proposed Decree is Anticompetitive*

CBS and ABC contend that rather than fostering competition in the television production market, the judgment will have a decidedly anticompetitive effect. They characterize the decree as one that will benefit a particular group of program producers by shielding them from the rigors of competition, but which makes the market in which such producers operate less competitive. In their view, the judgment protects competitors, not competition.

(a) Limitation on NBC Production

ABC and CBS argue that Section V of the judgment, which limits the amount of television programming that may be produced by NBC, will restrict the supply of television programs without altering the demand therefor. They contend that the effect, therefore, will be to drive up the price of television programming. Moreover, the networks argue that with one less producer in the market of programming production, competition among the independent producers will be relaxed. Notwithstanding the limited amount of internal production presently engaged in by NBC, ABC and CBS characterize their fellow network as a source of potential competition which serves as a substantial incentive to competition by others operating in the market. ABC and CBS further note that a production limitation is particularly inappropriate in light of the shortage of theatrical feature films for television. If the shortage worsens as a result of the judgment, the networks claim that the only foreseeable result will be yet higher prices charged by the major film studios for feature films.

(b) Restrictions on Terms of Trade

ABC and CBS complain that those provisions of the judgment which restrict the rights NBC may acquire from program producers are anticompetitive and will serve to reduce

competition among television program producers and suppliers. Their rationale, supported by affidavits of an economist and a professor of law, is that restrictions on the rights NBC may acquire in addition to the right of exhibition will force independent producers to bear more of the risk of a program's failure. For example, the networks refer to the restriction on the renewal options which NBC can purchase, arguing that the restriction prevents producers from selling "up front" to NBC options for later years of a program, thereby preventing them from realizing at an early date the current value of those options. CBS and ABC further argue that by shifting the risk of failure, the proposed judgment will force out small independent producers and suppliers, who are not in a position to absorb their costs of production without realizing quickly the full exploitation value of the program series.

CBS and ABC correctly recognize that the judgment is not intended to enhance competition among the three television networks. They view the judgment as establishing a complex system of regulation over the contractual relationships between the networks and independent program suppliers designed to afford the suppliers a fair price. To their mind, however, this is not the purpose of the Sherman Act, which is intended to protect competition rather than competitors, and should not be condoned by the Court. The government's response is that contrary to the assertions of the other networks, the judgment will enhance competition in the market of television program production by reducing the market power of NBC so that it is not as free to dictate the terms and conditions upon which it acquires rights in television programs.

2. *The Proposed Judgment Establishes a Regulatory Regime that Conflicts with the Regulatory Authority of the FCC.*

The FCC has promulgated rules and regulations bearing upon certain matters that are the subject of this judgment. The

Court has long recognized that there may be "a real and substantial problem" of accommodating antitrust relief with the FCC's regulatory scheme. It is no surprise that ABC and CBS now, again, argue that the relief provided by the judgment duplicates, overlaps and collides with the FCC's regulatory regime.

First, ABC and CBS argue that this Court will be placed in the position of overseeing a complex regulatory scheme resulting from the terms of the judgment. Of course, there is a duty upon a Court, once it has approved a consent judgment providing for injunctive relief, to oversee effectuation thereof. This is an unavoidable duty for courts handling large antitrust cases. While the degree of supervision required of a judgment is a significant factor to be considered, it alone should not bar relief where it is otherwise indicated.

In January of 1977 the FCC issued a notice of inquiry into the television industry, initiating proceedings in which many, if not all, of the matters here under consideration would be investigated. CBS and NBC contend that the regulatory scheme created by the judgment may conflict with the results of that inquiry. Since the FCC inquiry has only recently begun, and as of this date has not resulted in any rules or regulations, one may only speculate as to the possibility of conflict between the terms of this judgment and any rules that may materialize from the FCC's investigation. The overlap and possible conflict between the relief provided by the judgment and the regulatory scheme that may result from the FCC's inquiry is one of the most serious issues attending the Court's consideration of the consent decree. Therefore, the exact scope of the FCC's investigation must be considered by the Court.

All parties agree that the FCC's recently initiated inquiry into television programming practices covers almost every issue brought into question by the judgment. While it is not certain

that the FCC investigation will result in definite rules and regulations, there indeed is a substantial likelihood that the Commission will engage in further rule making once its investigation is completed. This Court previously has held that exclusive jurisdiction over the subject matter of the antitrust actions filed against the networks does not lie within the exclusive or primary jurisdiction of the FCC; there is, therefore, no legal impediment to this Court's decreeing appropriate antitrust relief. With respect to the issue of reconciliation of antitrust relief with the FCC's regulatory scheme, assuming this judgment is implemented prior to the conclusion of the FCC's investigation, the burden would fall on the Commission to formulate regulations not in conflict with outstanding judicial orders. While the Court is cognizant of the FCC investigation, and may even wish to take advantage of the expertise lent to that investigation by the FCC, the Court should not be deterred from ordering appropriate antitrust relief by the fact of the Commission's inquiry.

3. *The Proposed Judgment Undermines NBC's First Amendment Rights.*

ABC and CBS assert, presumably on behalf of NBC, the position that the judgment undermines First Amendment values in restricting NBC from engaging in internal production programming. Aside from the fact that CBS and ABC have no standing to assert constitutional rights of NBC, it may be observed that the judgment restricts NBC's participation in a commercial venture and in no way attempts to dictate the content of programs which may be exhibited on the NBC network. It is clear that the First Amendment does not shield NBC nor any other television network from the proscriptions of the Sherman Act.

C. ***Opposition of Pay Cable Television Industry***

The original proposed judgment submitted to the Court in November, 1976 contained a provision regarding the exclusive

exhibition rights of feature length films which NBC may acquire as against pay cable television. Following the receipt and consideration of numerous comments from interested parties, the vast majority of which were in opposition to the pay cable provision, the government and NBC decided to delete from the judgment any relief whatsoever concerning exclusive rights as against pay cable television. Thus, the judgment does not address the issue of exclusivity as against pay cable television.

The original pay cable provision provided that NBC may acquire exclusive rights to the exhibition of a feature film as against pay cable television use of such film for a maximum period of 24 months for two showings, and an additional 12 months for each showing in addition to the two original showings. The public comment on this provision, submitted primarily by members of the pay cable television industry, argued that this provision would set an industry-wide standard and confer government blessing on a blatantly anticompetitive practice. While the government's original intention in proposing the pay cable limitation was to establish a ceiling on permissible exclusive rights, upon the review of the public comments, it appeared to the government that the actual effect of the provision would be to establish a controlling standard in the television industry. Consequently, the pay cable provision was deleted from the judgment.

Notwithstanding the deletion of the provision, the pay cable parties maintain that the decree should not be approved by the Court so long as it omits to provide substantial relief against NBC's practice of obtaining exclusive rights as against pay cable television stations. The pay cable parties thus urge the government to pursue affirmative relief in the form of severe or total restrictions on NBC's power to acquire exclusive rights as against the pay cable industry. The government has not

officially responded to this position. After amending the judgment so as to delete the objectionable pay cable provision, the government did not issue a new competitive impact statement discussing the ramifications of the deletion of the pay cable provision. It is contended by some parties that a new competitive impact statement is required under the APPA and that the decree cannot be given final approval until an amended competitive impact statement is submitted by the government. The APPA does not expressly require the submission of multiple competitive impact statements, and the contention of the pay cable parties raises a question of first impression. While republication and initiation of a new period of receiving public comments apparently is not required by the APPA, arguably it is in keeping in spirit with the ACT to require the government to respond to the position of the pay cable parties that entry of the judgment by the Court is not in the public interest in the absence of affirmative relief with respect to exclusivity and pay cable television.

A well-recognized principle of law bearing on the issue raised by the position of the pay cable parties is that the government need not in a single action rectify all injustices uncovered by its investigation and discovery. With respect to the pay cable industry, it appears that, upon determining that it could not arrive upon a stipulated agreement providing for substantial relief, the government chose to defer to a later time actions which could result in the type of corrective action advocated by the pay cable parties. The issue for the Court's determination is whether, in the absence of any restriction on the right of NBC to acquire exclusive rights as against pay cable television, the judgment, which otherwise may be justified, fails to satisfy the public interest.

### D. *Objections of Public Interest Groups*

The only so-called public interest group to file comments with respect to the judgment was the Institute for Public

Interest Representation of Georgetown University Law School. The gist of their comments is that the competitive impact statement ("CIS") submitted by the government in support of the judgment is insufficient as a matter of law in light of the requirements of the APPA. The same objection also has been raised by ABC and CBS. In the case of ABC and CBS, objections to the form and content of the CIS are in actuality objections to the form and content of the terms of the judgment. For example, CBS complains that the CIS fails to explain how the judgment will enhance competition in the television program production market, whereas in fact the substance of CBS's objection is that in its view the judgment is anti- rather than pro-competitive.

The Institute for Public Interest Representation cites various perceived shortcomings in the CIS but fails to make a conclusive showing that the statement fails to satisfy the specific requirements of the APPA. The government has responded to the Institute's comments and is prepared to defend the CIS as legally sufficient.

All of the foregoing issues and conflicting conditions relating thereto have been considered by the Court; each contention has been weighed on the scale of whether it tilts for or against "the public interest"; each has been considered in light of the special interest of the respective proponents thereof. None of the proponents strikes the Court as an advocate for "the public interest." Although each proponent has been of assistance to the Court in its consideration of "the public interest," none has offered a solution that meets "the public interest." The government in its role as protector of "the public interest" appears to have accomplished an acceptable result.

The government, having expressed its proper prosecutorial prerogative by the filing of the instant action (together with the

actions against CBS and ABC), issue was long ago joined; all parties in each case proceeded with the utmost vigor to indulge the adversary process; and now the adversary parties (NBC and the government) have arrived at a compromise settlement of their litigated differences.

That the law looks with favor upon compromise settlements generally is indisputable; that it looks with particular favor upon such settlements as emerge from vigorous head-knocking on the part of capable and energetic adversaries whose prolonged stir and contest has occured at arm's length is, if anything, even more obvious. Embodying this policy and directly applicable to Court approval of a consent decree in civil public antitrust suits is the oft-quoted dictum of the Supreme Court in *Sam Fox Publishing Co. v. U.S.*, 366 U.S. 683, 81 S.Ct. 1302 (1961). There, in denying intervention as of right during proceedings to modify a consent decree to members of a music association which had entered into such a decree, the Court observed:

> [S]ound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the government in so acting.

*Id.* at 689, 81 S.Ct. at 1313. *See U.S. v. Armour & Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757 (1971); *U.S. v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37, 95 S.Ct. 926, 934 (1975).

This standard continues to apply with equal force even after enactment of the Antitrust Procedures and Penalties Act ("APPA"), Pub.L. 93-528, § 2, 88 Stat. 1076 (December 21, 1974), 15 U.S.C. § 16 (1977 Supp.), *U.S. v. Associated Milk Producers, Inc.*, 394 F.Supp. 29, 41 (W.D.Mo. 1975), *aff'd*, 534 F.2d 113, 117 (8th Cir. 1976). The district court in *AMPI*, after noting that pre-APPA criticism of the consent decree

procedures focused on the failure of the Justice Department and the courts to give substantial consideration to the views of third parties, the secrecy of the negotiation process itself, and the minimal judicial scrutiny of the proposed decree, 394 F.Supp. at 42, quoting Note, "The *ITT* Dividend: Reform of Department of Justice Consent Decree Procedures," 73 Col.L.Rev. 594, 597 (1973), observed:

> Courts, of course, cannot do anything about "the secrecy of the negotiation process itself." Indeed, a court's power to do very much about the terms of a particular decree, even after it has given the decree maximum, rather that minimum, judicial scrutiny, is a decidely limited power. *See United States v. Ward Baking Co.,* 376 U.S. 327, 84 S.Ct. 763, 11 L.Ed.2d 743 (1963); [*City of Burbank v. Gen. Electric Co.,* 329 F.2d 825, 831 (9th Cir. 1964).] Power to reform the procedures under which consent decrees are actually negotiated is vested in the executive and legislative branches, not the judicial. And, *if the Congress wants the judicial branch to have more power than that implicit in a threat of total rejection of a proposed decree, such power must be authorized by legislation which is considerably broader in scope than that vested by the newly enacted Antitrust Procedures and Penalties Act or by existing law.*
>
> Courts have long had power, however, . . . to devise and direct appropriate procedures to enable the Department of Justice and the court to have the benefit of the views of third parties. Courts which accept Brandeis' idea that "[s]unlight is said to be the best of disinfectants," L. Brandeis, *Other People's Money,* 92 (1914 ed.), have exercised that power under the circumstances of a particular case. That objective may be effectively attained by procedures which do not include the complications which may result from the granting of a formal motion to intervene as a party.

*Id.* at 42-43. [Emphasis supplied.] Adverting specifically to the impact of APPA on the procedures designed to meet these objectives, the Court noted:

> We agree, of course, with the statement in the Note [73 Col.L.Rev. 594] that "Most of the procedural devices contained in the Tunney bill have long been available to the courts to investigate decrees" and that "*the specific guidelines for judicial investigation* [now incorporated in the Antitrust Procedures and Penalties Act], all discretionary with the Court, *are hardly revolutionary.*"

*Id.* at 42 n.11 [Emphasis supplied.] On Appeal the Eighth Circuit, addressing its remarks to an issue analogous to that which this Court has been directing its energies, held that:

> It is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest. Thus, in our view, the intervention standard remains that which was stated in *Sam Fox:* "[B]ad faith or malfeasance on the part of the Government" in negotiating and accepting a consent decree must be shown before intervention will be allowed. 366 U.S. at 689, 81 S.Ct. at 1313, 6 L.Ed.2d at 609.

534 F.2d at 117.

One of the most thoughtful and thorough treatments to thus far emerge in the post-APPA era with regard to the proper posture and approach of a court faced with approval of a consent decree was offered by Senior Circuit Judge Aldrich in *U.S. v. Gillette Co.,* 406 F.Supp. 713 (D.Mass. 1975):

> Taken literally, the burden [that APPA places upon a court reviewing a proposed consent decree] is impossible. The legislative history shows clearly that Congress did not intend the court's action to be merely pro forma, or to be

limited to what appears on the surface. Nor can one overlook the circumstances under which the act was passed, indicating Congress' desire to impose a check not only on the government's expertise—or at the least, its exercise of it—but even on its good faith. *See* 120 Cong. Rec. S 20862 (daily ed. Dec. 9, 1974); BNA Antitrust & Trade Reg. Report No. 630, at A-15 (1973). At the same time, both by the statute's listing various alternatives short of a comprehensive examination, 15 U.S.C. § 16(f), and by the announced expectancy of both congressional committees, the court is adjured to adopt "the least complicated and least time-consuming means possible." *See* S.Rep.No. 93-298, 93d Cong., 1st Sess. 6 (1973); H.Rep.No. 93-1463, 93d Cong. 2d Sess. 8 (1974), 1974 U.S. Code Cong. & Admin. News 6539. *In this situation the court cannot provide the best of all possible worlds. Just as the parties are compromising, so in its process of weighing the public interest, must the court.*

This seems neither improper nor unwise. Fear has been expressed that the act's "elaborate procedure . . . will prove counterproductive and may, indeed, undermine [by placing too great obstacles on the consent process] effective enforcement of our antitrust laws." Handler, Antitrust—Myth & Reality in an Inflationary Era, 50 N.Y.U.L.Rev. 211, 243 (1975). Courts' involvement in preventing potential harm to competition can become excessive. *Cf. Emhart Corp. v. USM Corp.*, 1 Cir. 1975, 527 F.2d 177. I agree that *in terms of the important role of the consent decree in antitrust procedure, too much tillage can destroy the garden.*

Nor do I think Congress had, in fact, any contrary intention. The Senate Judiciary Committee reported that a high percentage of government antitrust actions are settled prior to trial, and recognized that the consent decree

> process was a "legitimate and integral part of antitrust enforcement." S.Rep., ante, at 3, 5. "Obviously, the consent decree is of crucial importance as an enforcement tool, since it permits the allocation of resources elsewhere." S.Rep. at 5. "[T]he Committee wishes to retain the consent judgment as a substantial antitrust enforcement tool." S.Rep. at 7. "The court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong.Rec. 24598 (1973).

*Id.* at 715. [Emphasis supplied.]

Turning to the precise standard by which a court is to determine whether or not a particular consent decree is in "the public interest," a matter concerning which the Act, 15 U.S.C. § 16(e), provides no apparent guidance and for which there is a paucity of clarificatory case law, Judge Aldrich concluded:

> It is not the court's duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of public interest. *Basically I must look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass.*

*Id.* at 716. [Emphasis supplied.]

Having adhered to Judge Aldrich's sound advice, and having found that the proposed consent decree is in the public interest, the Court notes certain aspects that this case shares with *AMPI* and *Gillette*, the two most significant and searching decisions interpreting APPA.

First, as in *AMPI,* all interested persons have been afforded every right and opportunity fully and fairly to state their views and comments that formal intervention would have granted, and consequently, as did the court in *AMPI,* 394 F.Supp. at 44, this Court has denied motions to intervene. Second, as in *AMPI,* this Court is "satisfied that [it has had] much more data before [it] for consideration than that contemplated by [APPA], 394 F.Supp. at 35, and consequently that, heeding Judge Aldrich's comment respecting Congress' intent that courts adopt "the least complicated and least time-consuming means possible," 406 F.Supp. at 715, "a plenary evidentiary hearing [pursuant to 15 U.S.C. § 16(f)(1) and (3)] is neither necessary nor appropriate under the circumstances." 394 F.Supp. at 35. The legislative history clearly and expressly establishes that "[i]t [was] not the intent of the committee to compel a hearing or trial on the public interest issue." S.Rep.No. 93-298, quoted with approval in H.Rep.No. 93-1463 (1974 U.S. Code Cong. & Admin. News at 6538-39), quoted in 394 F.Supp. at 45. Third, as in *AMPI,* this has not been a case "where the government has requested broad relief at the outset, represented to the courts that nothing less would do, and then abruptly 'knuckled under' . . .", 534 F.2d at 118. In *AMPI,* as in *NBC,* "it was merely certain practices, and not the concert of action *per se* which the government sought to end," *id.*; and in evaluating a proposed consent decree, one highly significant factor is the degree to which the proposed decree advances and is consistent with the government's original prayer for relief, *see U.S. v. Automobile Mfrs. Ass'n,* 307 F.Supp. 617, 621 (C.D.Cal. 1969), *aff'd per curiam sub. nom. City of New York v. U.S.,* 397 U.S. 248, 90 S.Ct. 405 (1970).

Finally, the Court derives additional confidence from the fact that this is not a case wherein objectors speak with one voice. In the deluge of comments which the proposed decree

has prompted, the Court has found that while some commentators (e.g., independent program producers and suppliers) have objected generally on the grounds that the proposed decree does not go far enough in eliminating the anticompetitive practices of which the government complains, *see supra* at 16-23, others (e.g., the other networks) have urged upon the Court the position that the proposed decree, far from ameliorating the allegedly anticompetitive practices asserted by the government to exist in prime-time broadcasting, would in fact exacerbate the situation and actually restrain otherwise healthy competition, *see supra* at 23-26. In this regard, this Court thus is not faced with the unified opposition to entry of the consent decree with which Judge Aldrich was confronted in *Gillette,* and which prompted him to remark that the court need not "require that defendant do everyting that opposers may wish. [Defendant] could always do something more. A point, however, comes where an agreement ceases to be a compromise." 406 F.Supp. at 716.

From the outset of this action, as in the predecessor actions, this defendant and the other network defendants in the companion cases, sought to persuade the Court to dismiss, abstain or otherwise disregard the lawsuits. On three or more separate occasions, the Court was fairly inundated by defendants with briefs, memoranda, and other legal documents urging upon the Court that it was either without jurisdiction to determine, or should leave to another body to determine, or, before deciding, should await the advisory benefits of another body's determination. In each instance the Court was strongly impressed with the desirability of leaving for resolution the complex and technical issues here involved to an administrative body specially equipped, trained, and oriented in the field of communications, particularly with respect to "prime-time" programming in television. If it had been properly within the province of this Court to determine what the law ought to be rather than to accept what it is, this case and others would have been dismissed or deferred temporarily or indefinitely.

The entities objecting to the consent judgment on a jurisdictional basis, primary or otherwise, misconceive the function of this forum. The law is clear that the government is at liberty to pursue its remedy here in an action sounding in the federal antitrust laws even though the ills they attack are, or likely are, remediable by the administrative action of the Federal Communications Commission. *See United States v. Radio Corporation of America,* 358 U.S. 334, 49 S.Ct. 457 (1959). The later case of *United States v. National Association of Securities Dealers, Inc.,* 422 U.S. 694, 95 S.Ct. 2427 (1975) offered some hope to those who favored the theory of predominance or exclusivity of jurisdiction within the administrative body having regulatory power over the alleged Sherman Act violations. But that later decision leaves the network defendants with hope for the future but no solace here. The case is distinguished from ours; in *National Association of Securities Dealers,* the Supreme Court found the *express* authorization under the Investment Company Act (15 U.S.C. § 80-1 et seq.) of the activities challenged as violative of the antitrust law. The Court found the express authorization "repugnant" to the antitrust laws and hence expressly authorized acts were deemed immune from antitrust attack. This is not our situation. Ours is at most a situation in which the government is free to invoke either or both the administrative or judicial forum jurisdiction for correction of evils condemned under the Communications Act and the antitrust laws. *RCA* makes it clear that the Communications Act does not inhibit enforcement by the government of antitrust laws in broadcasting matters merely because the FCC acted in regard to the challenged conduct.

In our case the FCC has not acted; it has asserted merely its intention to act. But that has been going on for years with no results. It was this Court's view from the outset that the

government could have, and perhaps preferably should have, bestirred the FCC to action rather than institute the current anti-trust actions against the networks. However, it is outside the province of this Court to dictate to the government a prosecutorial course of conduct. It is the Court's province merely to determine if the course adopted by the government is permissible in law. It is; *see American Telephone and Telegraph Co. v. U.S.*, 427 F.Supp. 57 (D.D.C. 1976), petition for writ of certiorari denied and portion of Feb. 3, 1977 order staying further proceedings in district court vacated (Per curiam order in No. 77-1009, D.C.Cir., May 26, 1977), *cert. denied,* 46 U.S.L.W. 3352 (U.S. Nov. 29, 1977).

The relief provided by the judgment is consistent with the government's general theory of liability as manifested in its complaint. The actions against the three television networks never were instituted for the purpose of breaking up their oligopolistic control of the television industry or for the purpose of fostering competition among the three of them. The government's case has been predicated on the recognition that each of the networks possesses enormous market power, and that this power is being used to place independent program producers and suppliers, those who sell television programming to NBC, at a distinct competitive disadvantage. From the outset the government has sought to improve the lot of the independent producers and suppliers and enhance competition in the buying and selling of television programming by imposing on the networks restrictions on the terms and conditions governing their contracts with the independent suppliers. Thus, the government has recognized that because of the enormous market power possessed by NBC, it has been able to deal with the independent suppliers on terms highly favorable to the network and highly unfavorable to the suppliers. The remedy the proposed judgment seeks to accomplish is to limit the

benefits and financial rewards that otherwise would flow from an exercise of this power. Accordingly, the Court has found that the consent judgment, on balance, advances and is in "the public interest," and so concluding, has approved said judgment.

The Clerk will send, by United States mail, to counsel for the parties a copy of this Memorandum of Decision.

DATED: January 26, 1978.

ROBERT J. KELLEHER

Robert J. Kelleher
United States District Judge

## CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on Jan 27 1978, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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Washington, D.C. 20036

**NOTICE**

**IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.**

## APPENDIX F

FILED
JUNE 4, 1979
EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

## UNITED STATES COURT OF APPEALS
## FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.
NATIONAL BROADCASTING COMPANY, INC.,
*Defendant-Appellee,*
and
CBS INC.,
*Applicant for Intervention-Appellee,*

No. 77-3381

MEMORANDUM

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.
NATIONAL BROADCASTING COMPANY, INC.,
*Defendant-Appellee,*
and
COLUMBIA PICTURES INDUSTRIES, INC., et al.,
*Applicants for Intervention-Appellants.*

No. 78-1068

**Appeal from the United States District Court for the Central District of California**

Before: CARTER and WRIGHT, Circuit Judges, and SOLOMON,* District Judge

* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

In these consolidated appeals, CBS and six independent suppliers of television entertainment programs (CPI) appeal from the denial of their motions for leave to intervene in an antitrust action brought by the United States (government) against the National Broadcasting Company (NBC).

We affirm.

In 1974, the government filed three separate, identical antitrust actions against NBC, CBS and the American Broadcasting Company (ABC). The government charged each of the television networks with violating the Sherman Act by combining with affiliated stations to monopolize prime time entertainment programming shown on that network. This appeal arises out of the action against NBC.

To promote competition among independent producers like CPI, the government sought to limit each network's "in-house" production of entertainment programs. The government also sought to restrict the program rights which the networks may obtain from independent producers.

In November 1976, the government and NBC agreed on the terms of a proposed final consent judgment. In essence, the judgment would

(1) enjoin NBC from acquiring certain rights in programs other than the right of first network exhibition, and enjoin NBC from syndicating programs—restrictions which are already in effect under FCC rules;

(2) prohibit NBC from refusing to broadcast an independent producer's program unless the producer granted NBC certain rights in the program—a prohibition which would take effect immediately;

(3) limit the number of prime time entertainment programs NBC may produce itself for exhibition on NBC stations—this limitation would not take effect until similar restrictions were placed on CBS and ABC; and

(4) restrict the terms which NBC may include in contracts with independent producers—most of these restrictions would not take effect until similar restrictions were placed on CBS and ABC.

Before a district court may approve a proposed consent judgment, the Antitrust Procedures and Penalties Act (APPA), 15 U.S.C. § 16(b)-(h), requires that it "determine that the entry of such judgment is in the public interest."

The APPA sets out the matters which a district court may consider in making its determination. 15 U.S.C. § 16(e). These include

> "the competitive impact of such judgment . . . and any other considerations bearing upon the adequacy of such judgment; [and] the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial."

The APPA also provides that in making its public interest determination the district court may, in its discretion, "authorize full or limited participation in proceedings before the court by interested persons, including . . . intervention as a party pursuant to the Federal Rules of Civil Procedure, . . . or participation in any other manner and extent which serves the public interest as the court may deem appropriate." 15 U.S.C. § 16(f).

The government filed and published a competitive impact statement on the proposed consent judgment. Many interested parties—including CBS, CPI, ABC, pay cable companies, and Congressmen—filed with the court extensive written comments on the competitive impact statement. CBS complained that the consent judgment was too restrictive. CPI complained that it was not restrictive enough.

In April 1977, CBS filed a motion for leave to intervene in the NBC action under Rule 24(a)(2) and 24(b)(2) Fed. R.Civ.P. A month later, in response to the comments submitted on its competitive impact statement, the government amended the proposed judgment.

In June 1977, CPI moved to intervene in the NBC action under the same rules for "the limited purpose of demonstrating that the proposed consent decree . . . is not in the public interest . . ."

CBS and CPI both submitted voluminous briefs in support of their motions. The district court denied the motions to intervene.

In November 1977, the district court approved the proposed consent judgment.

CBS and CPI appeal from the denial of their motions to intervene.

We have jurisdiction to review the denial of those motions. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,* 386 U.S. 129 (1967); *Brennan v. Silvergate,* 503 F.2d 800 (9th Cir. 1974).

**I. Intervention of Right.**

Under Rule 24(a)(2) an applicant is entitled to intervene when

> ". . . the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Therefore, even if the applicant satisfies the first two criteria, it may not intervene if its interest is adequately represented by existing parties to the action.

In government antitrust litigation, the court will presume that there is adequate representation of the interests of absentee parties, unless there is a strong showing that the government is not vigorously and faithfully representing the public interest. *United States v. Hartford-Empire Co.*, 573 F.2d 1 (6th Cir. 1978); *United States v. Associated Milk Products Inc.*, 543 F.2d 113 (8th Cir. 1976), *cert. denied*, 429 U.S. 940 (1977).

CBS and CPI contend that their interests in this action are not adequately represented by the government.

There are only a few cases in which a private party has been permitted to intervene in an action in which the government represents the public interest. In each case the proposed intervenors made a strong showing of inadequate representation.

Such a showing was made in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co., supra.* There, in an earlier decision, the Supreme Court held that El Paso's acquisition of the Pacific Northwest Pipeline Corporation violated the Clayton Act, and El Paso was ordered to divest itself of Pacific Northwest without delay. Instead of complying with the divestiture order, El Paso persuaded the government to negotiate a settlement. Cascade, whose sole supplier of gas was Pacific Northwest, sought to intervene under Rule 24(a)(2). The district court denied intervention and ultimately approved the settlement. On appeal, the Supreme Court held that Cascade was entitled to intervene because "the United States knuckled under to El Paso." *Id.* at 141.

Similarly, in *United States v. First National Bank and Trust Co. of Lexington*, 280 F.Supp. 260 (D.C. Ky. 1967), *aff'd per curiam sub nom Central Bank and Trust Co. v. United States*, 391 U.S. 469 (1968), the trial court allowed intervention after it found "about a ninety per cent capitulation" by the government.

Here, neither CBS nor CPI made a strong showing that the government inadequately represents their interests. For this reason, they fail to satisfy the third requirement of Rule 24(a)(2). The district court correctly denied their motions to intervene as of right.

Under the circumstances, it is unnecessary to consider whether CBS or CPI satisfied the two other criteria for intervention.

**II. Permissive Intervention.**

CBS and CPI contend that even if they are not entitled to intervene as of right, the district court erred in denying them leave to intervene under Rule 24(b)(2).

Under Rule 24(b)(2),

> "Upon timely application anyone may be permitted to intervene in an action. . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

CBS and CPI both satisfy the "common question of law or fact" requirement of the rule. But even when that requirement is met, permissive intervention is within the sound discretion of the district court. *May v. Commissioner of Internal Revenue,* 553 F.2d 1207 (9th Cir. 1977).

In exercising its discretion the district court considered the lengthy written comments on the proposed consent judgment, the contentions of CBS that the judgment was too restrictive and those of CPI that it was not restrictive enough. The court also considered whether intervention by CBS or CPI or either of them would unduly delay or prejudice the adjudication of the

rights of the government and NBC. The court stated that "further participation [by CBS and CPI] in the consideration of the decree, if appropriate, is not precluded by the denial of [their] intervention motion[s]."

Denial of a motion to intervene under Rule 24(b)(2) may not be disturbed on appeal unless there was a clear abuse of the court's discretion. *Allen Calculators Inc. v. National Cash Register Co.,* 322 U.S. 137 (1944); *U.S. Postal Service v. Brennan,* 579 F.2d 188 (2nd Cir. 1978); *May v. Commissioner of Internal Revenue. supra.*

Neither CBS nor CPI has shown that the district court abused its discretion in this case.

The denial of the motions for leave to intervene under Rule 24 is

AFFIRMED.

see 3727